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IN THE

Supreme Court of the United States

October Term, 1959

TRANS WORLD AIRLINES, INC.,

Petitioner,

v.

DELTA AIR LINES, INC., AMERICAN AIRLINES, INC., EASTERN AIR LINES, INC., NATIONAL AIRLINES, INC., CIVIL AERONAUTICS BOARD, CITY OF NASHVILLE, TENNESSEE, and THE NASHVILLE CHAMBER OF COMMERCE, CITY OF TAMPA, FLORIDA, and THE GREATER TAMPA CHAMBER OF COMMERCE, CITY OF KANSAS CITY, MISSOURI, CITY OF ST. LOUIS, MISSOURI, and THE CHAMBER OF COMMERCE OF METROPOLITAN ST. LOUIS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

JAMES K. CRIMMINS,
CHARLES PICKETT,
Attorneys for Petitioner,
25 Broadway,
New York 4, N. Y.

WARREN E. BAKER,
HENRY P. BEVANS,
ALAN BURTON LERNER,
of Counsel.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner, Trans World Airlines, Inc. ("TWA"), prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered on December 10, 1959 and amended and stayed thereafter.

Opinions Below

The opinions and order on reconsideration of the Civil Aeronautics Board ("the Board") are not reported, but appear in the printed joint appendix used below (479-510, 640-661).*

The opinion of the Court of Appeals, still unreported, is printed in Appendix B hereto.

Jurisdiction

The judgment of the Court of Appeals was entered on December 10, 1959 and amended January 7, 1960. The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1) and 49 U. S. C. §646(f).

Questions Presented

1. As applied to route proceedings before the Civil Aeronautics Board, what is the scope of the "mutual exclusivity" doctrine promulgated by this court in *Ashbacker Radio Corp.* v. *Federal Communications Comm.*, 326 U. S. 327? Thus:

(a) Does that doctrine apply to applications for routes going outside the area of an "area proceeding"; if so, under what circumstances?

(b) Must a carrier's claim of "mutual exclusivity" be resolved by the Board although no evidence is adduced to support it?

(c) Must a tardy claim of "mutual exclusivity" be considered?

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* Unless otherwise stated, numbers in parentheses herein refer to pages of the joint appendix.

(d) Must a hearing be held when "mutual exclusivity" is asserted; if so, what kind of hearing?

(e) What constitutes "economic mutual exclusivity"?

(f) Does that doctrine apply where the Board finds that "mutual exclusivity" does not exist? If it does, what weight must be accorded to the Board's expert conclusion that there is no "mutual exclusivity" and was such weight accorded here?

2. Even if the procedure followed by the Civil Aeronautics Board herein is deemed improper, should its order have been nullified in its entirety as far as the certificate awarded to petitioner was concerned?

3. Under the Civil Aeronautics Act, what finding of need is necessary to award a carrier a route connecting with its existing route?

Statutes Involved

Involved are parts of section 401 of the Civil Aeronautics Act of 1938 ("the Act"), 52 Stat. 987, 49 U. S. C. §481.* Also involved is Rule 12 of the Board's Rules of Practice in Economic Proceedings (14 C. F. R. §302.12).

Relevant provisions are printed in Appendix A.

Statement

For years the Board's route cases—comprising most of its economic proceedings (*infra*, p. 22)—have been vexed by attempts to extend to aviation this court's *Ashbacker* doctrine (*infra*, pp. 5-6).

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* Effective January 1, 1959, the Act was superseded by the Federal Aviation Act, 72 Stat. 737 *ff.*, 49 U. S. C. §1301 *ff.* The statutory provisions involved, however, remain essentially the same. See 49 U. S. C. §1371.

Confusion was to be expected. For *Ashbacker* "poses some difficult problems when applied to air-route certificate proceedings"* and "there must be some limitation to the Ashbacker rule when applied to air routes."**

Confusion actually resulted, as a dozen cases in three circuits testify.*** That confusion has been worse confounded by the decision below. In fact, it is contrary to a Second Circuit decision reached three months earlier.**** Only this court can resolve the issues at stake.

A few basic facts show the practical effect of the holding herein.

1. Eastern Air Lines, Inc. ("Eastern") formerly h[illegible] a monopoly of the route from St. Louis to the Southeas[illegible]

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* *National Airlines, Inc.* v. *Civil Aeronautics Board*, 101 App. D. C. 345, 347, 249 F. 2d 13, 15.

** *Eastern Air Lines, Inc.* v. *Civil Aeronautics Board*, 100 App. D. C. 184, 186, 243 F. 2d 607, 609; *Eastern Air Lines, Inc.* v. *Civil Aeronautics Board*, 101 App. D. C. 156, 159, 247 F. 2d 562, 565.

*** *Eastern Airlines, Inc.* v. *Civil Aeronautics Board*, 85 App. D. C. 412, 178 F. 2d 726; *Seaboard & Western Airlines, Inc.* v. *Civil Aeronautics Board*, 86 App. D. C. 9, 181 F. 2d 777; *Western Air Lines, Inc.* v. *Civil Aeronautics Board*, 184 F. 2d 545 (9 Cir.); *Northwest Airlines, Inc.* v. *Civil Aeronautics Board*, 90 App. D. C. 158, 194 F. 2d 339; *United Air Lines, Inc.* v. *Civil Aeronautics Board*, 97 App. D. C. 42, 228 F. 2d 13; *Delta Air Lines, Inc.* v. *Civil Aeronautics Board*, 97 App. D. C. 46, 228 F. 2d 17; *North American Airlines, Inc.* v. *Civil Aeronautics Board*, 100 App. D. C. 40, 241 F. 2d 445; *Eastern Air Lines, Inc.* v. *Civil Aeronautics Board*, 100 App. D. C. 184, 243 F. 2d 607; *Eastern Air Lines, Inc.* v. *Civil Aeronautics Board*, 101 App. D. C. 156, 247 F. 2d 562; *National Airlines, Inc.* v. *Civil Aeronautics Board*, 101 App. D. C. 345, 249 F. 2d 13; *Eastern Air Lines, Inc.* v. *Civil Aeronautics Board*, ... F. 2d . . . . . (2 Cir.), printed in Appendix C hereto. All these cases except the first *Eastern* case cited *Ashbacker*.

**** *Eastern Air Lines, Inc.* v. *Civil Aeronautics Board*, ... F. 2d . . . . . (2 Cir., Oct. 7, 1959), printed in Appendix C.

2. Dissatisfied with Eastern's service, the City of St. Louis applied for more air transportation to the Southeast (19-22).

3. The Board found that public convenience and necessity required a competitive air carrier from St. Louis to the Southeast (489-490). The court below sustained that finding (App., pp. B22-B23).

4. After lengthy hearings, the Board found TWA the most qualified applicant to render the new service (490). That finding likewise was sustained (App., p. B24).

5. TWA began service in December 1958. Yet the decision below would deprive St. Louis of this needed additional service, pending exploration by the Board of other applications to fly over other routes in other parts of the country.*

That extension of *Ashbacker*, we propose to show, is unwarranted and unsound.

The *Ashbacker* Case

Ashbacker Radio Corp. v. *Federal Communications Comm.*, 326 U. S. 327, involved two rival applications to operate on the same radio frequency from cities only 35 miles apart. The Commission itself found that simultaneous operation "would result in intolerable interference" and conceded the applications were "actually exclusive" (p. 328). Nonetheless it granted one application without hearing the rival applicant.

This court held that procedure improper. "We only hold that where two *bona fide* applications are mutually exclusive the grant of one without a hearing to both de-

* Two other route complexes were considered. (1) Southern transcontinental routes between the Pacific Coast and the Southeast, which would not come within 400 miles of St. Louis. (2) A route, sought by Eastern, from St. Louis to the Pacific Coast.

prives the loser of the opportunity which Congress chose to give him" (p. 333).

Two facts will be noted.

1. Mutual exclusivity was conceded. "No suggestion is made here," this court observed, "that it may be possible to make workable adjustments so that both applications can be granted. The Commission concedes that 'these applications are actually exclusive'." (p. 332).

Precisely the opposite is true here. Indeed, the Board found flatly that mutually exclusive applications were not involved (497, 647, 651).

2. This court also said significantly: "There is no suggestion, let alone a finding, by the Commission that the demands of the public interest were so urgent as to preclude the delay which would be occasioned by a hearing" (p. 333).

Here, on the contrary, the Board found (648):

> "We would not be justified in depriving the public for a matter of years of a service that has been found, after extensive evidentiary hearings in which all parties were given an opportunity to participate, to be required by the public convenience and necessity."

Further discussion of *Ashbacker* must await a resume of the facts involved here.

The Area Proceeding

On application by St. Louis (19-22), the Board instituted this proceeding—the *St. Louis-Southeast Service Case*—in March 1956 to consider the need for more airline service in the area "between St. Louis on the one hand and Florida and other southeastern points on the other

hand" (31).* All pending applications for routes within that area were consolidated in the proceeding (97-98).

Area proceedings were expressly sanctioned in *Civil Aeronautics Board* v. *State Airlines, Inc.*, 338 U. S. 572, 576-577. But area proceedings breed *Ashbacker* claims. The reason is manifest.

An award of a new route within an area is almost bound to have some impact outside that area. No area is completely isolated.

The existing route structure is highly complex. All major cities have already been placed on the routes of at least two of the eleven major trunkline carriers. Invariably, therefore, some points within the area are linked with places outside the area by existing routes. Nearly always those routes are being operated by some of the applicants for new routes within the area.

Here, for instance, all four applicants for the new St. Louis-Southeast route operated outside that area.** Their applications involved potential services extending beyond the area to numerous extra-area points.***

Consequently it is all but inevitable that an area proceeding will have collateral repercussions extending beyond the area. Almost invariably, too, some carrier claims at

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* Later the area was broadened slightly to include Memphis (91).

** Braniff had St. Louis-Kansas City and St. Louis-Minneapolis/St. Paul authority; Delta, St. Louis-Chicago and Memphis-Kansas City; National, Miami-Havana; and TWA, St. Louis-California.

*** Potentially, Braniff's application involved service between Miami and both Kansas City and Minneapolis/St. Paul; Delta's, Chicago-Tampa and Kansas City-Miami service; National's, St. Louis-Havana service; TWA's, indirect California-Florida service via St. Louis.

some stage that extra-area repercussions will somehow affect its own application for a different route outside the area but in some way connected with it. Citing *Ashbacker*, it wants simultaneous consideration of its extra-area application.

Exactly that happened here. In fact, this case has two *Ashbacker* aspects. One relates to the supposed effect of the new St. Louis-Southeast route on applications for new southern transcontinental routes. The other concerns Eastern's application for a new St. Louis-California route. For clarity, we will take them up separately.

The Southern Transcontinental Routes:
The Existing Routes

Southern transcontinental service between California and the Southeast is now carried on under "interchange" agreements.

Interchange agreements are made between carriers having connecting routes. A single airplane is flown over the entire route. Each carrier, however, operates the airplane only over its segment of the route. At the connecting points, the airplane must stop. A new crew, provided by the next carrier, takes over. The stops and changes in control slow up the operation considerably. Hence an interchange operation suffers from certain inefficiencies.

Two interchange agreements have heretofore provided southern Pacific Coast-Southeast through service. One goes from California, via Dallas and New Orleans, to Miami. The connecting carriers are, successively, American Airlines, Inc. ("American"), Delta Air Lines, Inc. ("Delta") and National Airlines, Inc. ("National"). The other goes from California, via Dallas, to Atlanta. American and Delta are the participants.

The Applications for Additional Southern Transcontinental Service

Interchange service is rapidly becoming obsolete. It does not meet the public demand for air transportation.*

Several applications were, therefore filed for single-carrier southern transcontinental routes. Among the applicants were the carriers operating the existing interchanges—American, Delta and National—and TWA.

All those applications were eventually consolidated into an area proceeding called the *Southern Transcontinental Service Case.*** The Board defined the area involved in that case as (772-773):

> "... that part of the country lying south of a line extending from Jacksonville, Fla., to Atlanta, Ga., Birmingham, Ala., Dallas and Fort Worth, Tex., and thence west to Albuquerque, New Mex., Las Vegas, Nev., and Oakland and San Francisco, Calif."

St. Louis is about 400 miles north of the upper limit of this southern transcontinental area. An indirect route from the Pacific Coast to St. Louis to the Southeast falls outside the *Southern Transcontinental Service Case.* It is simply not a southern transcontinental route.

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*"As compared with single carrier, single plane service, an interchange service is more limited in its flexibility and does not as readily permit the frequent modifications in service necessary to meet the changing needs of air transportation. This arises chiefly from the fact that where two airline managements must agree on each schedule change, the alteration of scheduling often becomes a laborious process." *Denver Service Case*, Order E-9735 (Nov. 14, 1955), pp. 4-5; *Florida-Texas Service Case*, Order E-10635 (Sep. 24, 1956), pp. 3-4.

**That proceeding was not begun until two years after the *St. Louis-Southeast Service Case* (29, 764).

The Interest of American, Delta and National in a Possible TWA Route from St. Louis to the Southeast

TWA has long been authorized to fly between the West Coast and St. Louis. A new TWA route from St. Louis to the Southeast would enable it to carry transcontinental traffic roundabout between Pacific and Southeastern points.

Everybody realized that—in particular, American, Delta and National, the parties to the interchange agreements. Alive to the situation, all three endeavored from the start of the *St. Louis-Southeast Service Case* (58-59, 64-65, 74, 83-84, 128-129) to protect what American termed their "substantial stake in southern transcontinental service" (445-446). In fact American, which did not seek a St. Louis-Southeast route, intervened in the case for that very purpose (445-446).

Until the Board's decision was announced, nobody seriously urged that the potential TWA routing—going hundreds of miles outside the southern transcontinental area—would foreclose new single-carrier southern transcontinental awards (642-643).* But the three interchange carriers were concerned about their existing service. Of all southern transcontinental routes, the inherently inadequate interchanges would be most nearly susceptible to possible TWA competition.

Hence all three carriers proposed limitations to protect their existing southern transcontinental interchange service. Throughout, they contended that any real effect on that service would be eliminated by imposing on TWA's passengers the inconvenience of changing airplanes at St. Louis (58-59, 63-64, 93, 128, 371, 473, 570, 576).

Any limitation protecting the relatively inefficient interchange would *a fortiori* protect a new single-carrier southern transcontinental route.

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* At one stage, National moved to consolidate into the proceeding its pending application for a southern transcontinental route but did not press this maneuver (644-646).

The Board's Initial Consolidation Order

With matters in this posture, the Board entered its initial consolidation order (89-99).

Several carriers—notably Eastern—had sought to expand the case to include applications for new service outside the area. Granting their motions would have embroiled the Board in mammoth full-scale proceedings involving quite different issues. Declining to countenance the inevitable delay, the Board denied the motions (94-97).

But that does not mean the Board went to the other extreme and announced it would ignore the possible impact of a new St. Louis-Southeast route on service beyond the area. Such a ruling would have marked a radical break in the Board's established practice. The point is important to stress.

Many methods are open to resolve a claim that applications are mutually exclusive.* One way is to consolidate the applications, hear them in full on the merits and resolve them together. That procedure, however, is usually open to practical objections.**

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* Three such methods were summarized in *Delta Air Lines, Inc. v. Civil Aeronautics Board*, 97 App. D. C. 46, 51, 228 F. 2d 17, 22. There the court said that, "when two applications are alleged to be mutually exclusive," the Board "may, for example, (1) set for hearing and thereupon decide the issue of exclusivity as a separate preliminary issue; (2) proceed to a comparative hearing upon the two applications without further ado; or (3) set for hearing and thereafter decide the merits of the two applications and also the issue of exclusivity." The Board, as will be seen shortly, uses a fourth method.

** The Board stated them pungently in *Matter of Eastern Air Lines, Inc.*, Docket No. 3292, Order E-9990 (Feb. 9, 1956), pp. 5-6. Among other things, the proceeding becomes unwieldy, long delay results and the Board may find itself considering issues that ultimately emerge as moot.

Hence the Board follows, as here, quite a different practice. Even when it denies consolidation, all concerned are still free to adduce at the hearings evidence of mutual exclusivity. Before it makes any award, the Board can resolve any conflict in the evidence adduced.

That practice was known to all parties here. Only a few months before, in a proceeding of which the *St. Louis-Southeast Service Case* was an outgrowth, the Board had reaffirmed that intervenors in an area proceeding "will be entitled, as in all proceedings where there exists overlapping applications, to urge the mutual exclusivity of their respective proposals."*

Indeed, the Board's practice—once questioned by the District of Columbia Circuit**—was later judicially approved.***

At no time did the Board say herein that it was departing from its settled practice. On the contrary, it expressly indicated that it would consider the impact of any new St. Louis-Southeast route on southern transcontinental service.

To that end, the consolidation order imposed one limitation forthwith: any new flights operating beyond St. Louis

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* *Great Lakes-Southeast Service Case, Order* E-9734 (Nov. 10, 1955), p. 6. The Board referred to that order in its consolidation order herein (93). See also, *Matter of Eastern Air Lines, Inc.*, Docket No. 3292, Order E-9990 (Feb. 9, 1956), p. 5: "Delta remains a party to this proceeding as an intervenor and it is still free, of course, to endeavor to establish mutual exclusivity in accordance with our initial order, if it so desires."

** *Delta Air Lines, Inc.* v. *Civil Aeronautics Board*, 97 App. D. C. 46, 50, 228 F. 2d 17, 21.

*** *National Airlines, Inc.* v. *Civil Aeronautics Board*, 101 App. D. C. 345, 249 F. 2d 13, approving Order E-10600 (Sep. 10, 1956), p. 3, issued before the Board denied reconsideration of its consolidation order herein (147); *Eastern Air Lines, Inc.* v. *Civil Aeronautics Board*, . . . F. 2d . . . . . (2 Cir.), approving Order E-9734 (Nov. 10, 1955), p. 6. (See App., pp. C4-C5.)

would have to "be operated with, as a minimum, a scheduled stop at St. Louis" (98). It left the parties free to "advance at the hearing appropriate material bearing on the need for more stringent limitations" (98; see also, 93).

Far from refusing to consider how a new St. Louis-Southeast route would affect southern transcontinental service, the Board made plain that it was awaiting the parties' evidence on that score.

The Hearing

The interchange carriers—American, in particular—availed themselves of the Board's invitation. They adduced evidence (*e.g.*, 208-211; 229-234) relating to the possible impact on their existing southern transcontinental service of a St. Louis-Southeast award to TWA.

Not once at the hearing, however, did they proffer any evidence that such an award would foreclose new southern transcontinental service.

On its phase of the case, Eastern vociferously asserted mutual exclusivity throughout (*e.g.*, 156, 165, 274-275, 398, 405, 618) but offered no evidence to support its claim. The applicants for new southern transcontinental service, however, did not even contend at the hearing that they would be foreclosed by a St. Louis-Southeast award to TWA.

The Board's Decision

The Board found that "the public convenience and necessity require the selection of TWA to operate" the new St. Louis-Southeast route (500-501). It refused to impose any further restriction on that route (496). After weighing the evidence (494-496), it concluded: "We are not persuaded that the impact on the Interchange, nor on American's operations for that matter, will be so great as to require the denial to the traveling public of the service benefits accruing from the through-plane service via St. Louis proposed by TWA" (496).

Significantly, the Board added (497):

> "We have no hesitation in stating that the availability of TWA's service via St. Louis would not in any real sense preclude a finding of public need for a more direct routing, a matter at issue in the newly instituted *Southern Transcontinental Service Case*, Docket No. 7984 *et al.*"

Seeking reconsideration, the interchange carriers came up with *Ashbacker*. The Board rejected their claims of mutual exclusivity as tardy (642-646) and not established "at the hearing stage" (646). "All parties were free to do so, and there were no limitations on the issues that would have prevented them from making a full and complete showing" (646).

On the merits, moreover, the Board held the claims groundless (646-647):

> "... it does not follow that granting TWA authority that would make possible such a service would preclude a subsequent grant of the applications in *Southern Transcontinental* involving possible nonstop and one-stop service by a different and more direct routing and which can derive support from such additional major traffic markets as Dallas, Houston, and New Orleans. We find that the grant of the restricted authority to TWA will not as a matter of economic fact preclude a subsequent grant of southern transcontinental routes via Texas and other southern points in Southern Transcontinental."

The Court's Decision

The Court of Appeals disagreed. Extending *Ashbacker* to the very different situation presented, it said (App., p. B14):

> "A *prima facie* indication of economic mutual exclusivity between the applications consolidated in the

Southern Transcontinental Case and the route awarded in the *St. Louis Case* to TWA appears in this record."

Therefore, it held, a "hearing on the question is required" (App., p. B12). It thought no hearing had been held on that question (App., p. B13). It dismissed the Board's findings that there was no mutual exclusivity as "not based on evidence, and they are not consequent to a hearing on the issue of exclusivity" (App., p. B14).

The legal errors in the court's opinion will be adverted to below. Certain factual assertions, however, should first be noted.

The Court's "*Prima Facie* Indication" of "Economic Mutual Exclusivity"

The court evolved its "*prima facie* indication of economic mutual exclusivity" from two sources.

1. In 1954, the Board had concluded in a different proceeding—on the basis of 1952 traffic conditions which are now obsolete—"that the potential traffic between the Florida coast and the California coast was not sufficient to justify two competitive interchange services" (App., p. B11).

2. American had estimated (234) that an award to TWA would divert 50% of the 1955 interchange traffic (App., pp. B10, B12). This guess was based on the totally unreal assumption that TWA would "implement" the route "to the fullest possible extent" without regard to "the profitability of such implementation" (211).*

Putting these nebulositites together, the court said "it seems to us the TWA service must, *prima facie*, be viewed

* The same points underlie the court's surprising holding that the Board somehow did not really evaluate the impact of the new TWA route on the existing interchange (App., pp. B15-B16).

as a potential competitor to some similar extent of any awardee of a transcontinental route Florida coast to California coast involving one or more stops" (App., p. B12).

The Actual Facts

Implicit in the court's argument is the assumption that former traffic conditions still prevail. That is simply not so. The traffic has increased tremendously since 1952. It is still increasing (765-766).*

Actual experience clinches the matter.

TWA began carrying traffic over the new route in December 1958. Yet traffic over the interchanges flourished.

The record in the *Southern Transcontinental Service Case* shows that "each of the interchange carriers carried substantially more traffic on the interchange flights after the inauguration of TWA's service in December, 1958, than previously. For example, the volume of traffic on American's interchange flights in and out of Dallas increased 35% between March, 1958, and March, 1959; that of Delta increased 35%; and that on National's in and out of New Orleans, approximately 15% (Exhibit Nos. AA-

* The Board's official Air Line Traffic Surveys, which were stipulated below, show that total domestic revenue passenger miles rose from 12.3 billion in 1952 to 28.5 billion in 1959. To illustrate the increase in annual revenue passengers, latest available figures show:

	1952	*1955*	*1958*
Los Angeles-Miami	8,052	19,357	28,730
San Francisco-Miami	4,830	7,670	12,818
Los Angeles-Tampa	3,162	4,758	8,112
San Francisco-Tampa	3,186	2,964	4,615
Los Angeles-Atlanta	4,794	10,426	10,699
San Francisco-Atlanta	4,002	5,603	6,786
Total	28,026	50,778	71,760

1013, 1111; DL ST 93, 93A; NAL 802, 867)."* Interchange flights increased in frequency by 20%.**

Moreover, officers of the interchange carriers testified in the *Southern Transcontinental Service Case* that TWA's route in no way affected the need for direct southern transcontinental service.*** The TWA route via St. Louis was termed "a minor factor, if at all" in the picture.**** In fact, they asserted that TWA's route would "wither on the vine" once a single-carrier southern transcontinental route was authorized.*****

The Court's Belief That the Board Denied a Hearing on Mutual Exclusivity

The court recognized that applicants for new southern transcontinental service "obviously" were initially "well aware of the implications of the TWA application" (App., p. B13). It thought, however, the Board denied them a hearing on mutual exclusivity because it "refused" to "expand the *St. Louis Case* so as to include transcontinental considerations" and "strictly limited that case to issues relating to St. Louis-Southeastern points service" (App., p. B12).

Apart from the legal question whether a hearing was necessary, the court simply misunderstood the situation.

1. The Board did not exclude "transcontinental considerations" from the case. It plainly indicated it would

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* Affidavit of W. D. Brewer, December 31, 1959, par. 3, submitted to the Court of Appeals on TWA's motion for a stay, which was granted.

** *Id.*, par. 4.

*** *Id.*, par. 6.

**** *Id.*, par. 6(d).

***** *Id.*, par. 6(d).

consider the impact of an award on existing southern transcontinental service (*supra*, pp. 12-13).

2. All the Board refused to do was expand the case by consolidating therewith applications for routes beyond the area. But its settled practice (*supra*, p. 12) has been "that all carriers are free to urge mutual exclusivity on the basis of the evidence as to applications not consolidated in a particular case" (693). Nowhere did the Board say it would abandon that practice.

3. By the same token, the "issues relating to St. Louis-Southeastern points service" included those arising from such evidence as the carriers chose to introduce on mutual exclusivity.

4. The carriers had ample opportunity to adduce such evidence. Had they had any, it would surely have been offered—it would have shown *a fortiori* the impact of a new TWA route on the existing southern transcontinental interchanges.

5. Finally, the court held that Eastern was aware "that the issue of mutual exclusivity was open to it during all stages of the hearing" (App., p. B20). If the Board's order left Eastern free to litigate mutual exclusivity, how did it prevent the other carriers from litigating that issue? The court never explained that mystery.*

This brings us to the Eastern phase of the case.

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* We do not mean to suggest that the carriers other than Eastern were not barred from establishing mutual exclusivity by other reasons, *i.e.*, their tardiness and noncompliance with the Board's Rule 12 (App., pp. A4-A5), upheld in *North American Airlines, Inc.* v. *Civil Aeronautics Board*, 100 App. D. C. 40, 241 F. 2d 445. On the contrary, here too we believe the court erred. For brevity, however, that point will not be elaborated here.

Eastern's Claim of Mutual Exclusivity Vis-a-Vis TWA

Eastern already held a monopoly of St. Louis-Southeast service. It had pending applications to fly from St. Louis to California. TWA and American were already serving that route (21, 254-256).

Whether additional St. Louis-California service was needed depended, of course, on considerations entirely different from those governing whether additional St. Louis-Southeast service was needed.

Combining Eastern's existing and proposed routes, it would have several routes from the Atlantic Coast via St. Louis to the West Coast. One such route would duplicate the routing awarded TWA herein. This gave rise to Eastern's principal claim of mutual exclusivity.*

(a) The Proceedings Below

Citing *Ashbacker*, Eastern promptly moved to consolidate its applications for St. Louis-West Coast service into this area proceeding (44).

Declining, for "public interest considerations," to transform the case "into a gigantic proceeding" (650), the Board denied Eastern's motion (92-94, 149).

Eastern remained free, as it recognized, to establish mutual exclusivity at the hearings (156, 274-275, 398, 405, 618). The court remarked on "Eastern's awareness that the issue of mutual exclusivity was open to it during all stages of the hearing" (App., p. B20).

Despite this awareness, Eastern submitted no evidence on the issue.

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* A subsidiary claim, which does not involve TWA, is mentioned *infra*, pp. 21-22.

(b) The Court's Ruling

Under the same circumstances, the Second Circuit said in October 1959, in *Eastern Air Lines, Inc.* v. *Civil Aeronautics Board*, ... F. 2d . . . . . (App., p. C6):

> "We hold that in an area proceeding where an applicant objects to exclusion of his application by a consolidation order, and does not submit evidence in support of his objection, the agency may treat the objection as not having been made."

But the court below held otherwise. It said that Eastern's petition for reconsideration of the Board's final order "did refer to some facts on which it relied to show mutual exclusivity" (App., p. B20).* Somehow this tardy reference entitled Eastern to "specific findings," which the court thought had not been made (App., p. B20).

(c) The Board's Findings

While unnecessary, on reconsideration the Board actually made specific findings on the issue (651). Though denying that *Ashbacker* applied, it concluded that "the TWA award will not preclude a later grant of Eastern's application" (651).

The court said it did not understand the Board's reasoning (App., p. B19). Reading the findings in light of Eastern's cryptic petition for reconsideration (618-619), the Board's position seems plain—Eastern was guilty of a basic fallacy.

Eastern argued as if its proposed new St. Louis-West Coast service could be sustained only by traffic moving between the Southeastern and West Coast points served

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* In the Second Circuit case, Eastern followed exactly the same course, as the record on appeal therein (J. A., pp. 1438a-1439a) shows.

by TWA. That traffic, it theorized, could not support two carriers operating large jet aircraft (618).

In effect, said the Board, Eastern's initial premise was false. Two other "varied" sources of traffic could sustain a new Eastern route from St. Louis to the West Coast (651).

(a) Traffic would flow between St. Louis and "the other points west thereof named in its application" (651).

(b) A "substantial volume" of traffic from all the other points on Eastern's widespread routes in the eastern part of the country, *e.g.*, New York, Washington, Boston, Philadelphia, Providence, would "feed into the route" at St. Louis (651).*

The Court's Inconsistent Treatment of Eastern's Position Vis-a-Vis Delta

Curiously enough, the court refused to apply its logic to Eastern's claim of exclusivity *vis-a-vis* Delta.

Delta was already certificated to fly from Kansas City —a point "well outside the area of the case" (App., p. B20)—to Memphis, and then by a very roundabout route to Miami. It was awarded a new route permitting direct Kansas City-Memphis-Southeast service.

But Eastern also wanted a new route (Memphis-Kansas City) which would enable it to provide the same direct service. Hence it claimed mutual exclusivity.

Yet here the court held that *Ashbacker* did not apply; Eastern's claim involved only "expansion of an area case by adding a little additional segment outside the area" (App., p. B21). The "little additional segment" from St.

* This "'back-up' traffic" (651) could, of course, be considered in determining whether a new route should be granted. *Frontier Airlines, Inc.* v. *Civil Aeronautics Board*, 104 App. D. C. 78, 80, 259 F. 2d 808, 810. So the court conceded here. (App., p. B24).

Louis to Kansas City, "well outside the area," is over 230 miles. Why the Board may ignore mutual exclusivity claims to a route extending 230 miles beyond the area, but must consider other claims where the extension is greater, the court never made clear.

Reasons for Granting the Writ

This case illustrates the intolerable confusion and conflict of decisions caused by extensions of *Ashbacker* to new route cases. The importance of clarifying the law can hardly be overstated.*

The Practical Importance of the Problems

1. The domestic air route system has been constantly expanding. In 1938, it covered 39,300 route miles; by mid-1958, 254,100 route miles. *Annual Report of the Board for 1958*, p. 2.

2. Expansion goes on apace. On June 30, 1957 the Board had 1,450 economic applications pending. A year later the number was 1,616. *Annual Report of the Board for 1958*, p. 41. About 70% were for new routes or amendments of existing routes. *Annual Report of the Board for 1957*, p. 18.

3. Route cases—particularly area cases—almost invariably give rise to *Ashbacker* problems (*supra*, pp. 7-8). And the Court of Appeals' extensions of *Ashbacker* complicate the Board's already complex tasks, entail delay and hinder the administrative process.

There can be no doubt that the court below is expanding *Ashbacker* and causing growing confusion.

* The ramifications of *Ashbacker* extend to many fields other than aviation.

The Confusion Resulting from the Extensions of *Ashbacker*

Ashbacker involved (a) undisputed physical conflict, (b) between applications to operate in the identical area, (c) which the administrative body conceded were mutually exclusive, (d) with no "suggestion" to the contrary, and (e) "no suggestion" that the delay occasioned by a hearing to resolve the conflict would affect the public interest.

Here, however, the court extended *Ashbacker* to situations involving (a) disputed assertions of "economic exclusivity," (b) between applications for routes in different parts of the country, (c) which the Board found were not mutually exclusive, (d) with no real proof to the contrary, despite (e) the Board's finding that the public interest would be adversely affected by further delay involved in additional hearings.

These extensions of *Ashbacker* leave the law in utter confusion. A few examples make that plain.

1. Does *Ashbacker* apply at all to applications for routes going outside the area?

(a) Pragmatic considerations would justify a simple rule that *Ashbacker* should not apply unless mutual exclusivity was practically indisputable.

That rule would avoid delays incident to the resolution of debatable claims of mutual exclusivity. Proceedings involving years of labor could no longer be overturned because a court later disagreed with the Board's evaluation of a dubious claim.

Such a rule would be especially desirable where the claim of mutual exclusivity raised quite collateral issues. St. Louis' need for more Southeast service, for example, would not have to go unsatisfied while the Board explored wholly different considerations relating to Eastern's desire to fly from St. Louis to California.

(b) Apparently the court below prefers a different rule.* But no one knows what its rule is.* It even draws invidious distinctions between routes extending 230 miles outside the area and routes extending farther beyond it (*supra*, pp. 21-22).

2. Must a claim of mutual exclusivity be resolved although no evidence is adduced to support it?

The decisions are in direct conflict.

The Second Circuit held that, when no evidence is offered to support the claim, "the agency may treat the objection as not having been made." *Eastern Air Lines, Inc.* v. *Civil Aeronautics Board*, ... F. 2d . . . . . (Oct. 7, 1959), see App., p. C6.

There, as here, Eastern claimed mutual exclusivity. There, as here, Eastern offered no evidence to substantiate its claim although having ample opportunity to do so. There, as here, when Eastern sought reconsideration, it tried to lend color to the claim. There the Second Circuit held that Eastern's claim was waived. Here the court held it still had to be considered on the merits.

3. Must a tardy claim of mutual exclusivity be considered?

Orderly administration is defeated if afterthoughts—which are not likely to have real merit—must be considered. *North American Airlines, Inc.* v. *Civil Aeronautics Board*, 100 App. D. C. 40, 241 F. 2d 445, so recognizes.**

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* Yet the Second Circuit read *Eastern Air Lines, Inc.* v. *Civil Aeronautics Board*, 100 App. D. C. 184, 243 F. 2d 607, as suggesting "that the *Ashbacker* doctrine was inapplicable to large-scale, multi-application area proceedings." See *Eastern Air Lines, Inc.* v. *Civil Aeronautics Board*, ... F. 2d . . . . , App., p. C4, note 8.

** That case sustained the Board's Rule 12 (App., pp. A4-A5), which is designed to prevent tardy claims of mutual exclusivity

Yet here the court held that, although American's and Delta's belated claims of mutual exclusivity with respect to new southern transcontinental service were not advanced until after the Board's ruling was announced, they had to be considered.

Those carriers were not misled, as the court seemed to suppose, into thinking that mutual exclusivity was not an issue in the case. Eastern admittedly was aware that "the issue of mutual exclusivity was open to it during all stages of the hearing" (App., p. B20). American, Delta and National were equally so aware. Their mutual exclusivity contentions were sheer afterthoughts (*supra*, pp. 10, 14, 17-18). Cf. *Civil Aeronautics Board* v. *State Airlines, Inc.*, 338 U. S. 572, 579.

4. Must a hearing be held when mutual exclusivity is asserted?

The court below thinks a "full hearing" is "required" (App., p. B20) to resolve every claim of exclusivity—however specious—provided "the allegations of fact are sufficient to raise a debatable question" (App., p. B14). What a "full hearing" entails is unclear.*

Evidently the Board must accept the allegations at face value. It is immaterial that, in light of all the known facts, the Board regards the claim as groundless.

Here the claims of mutual exclusivity were not even *prima facie* sound (*supra*, pp. 15-17, 20-21). But why compel the Board to hold a "full hearing" to evaluate a claim simply because it is alleged plausibly? Such a requirement seems especially formalistic where, as here, the claimants have failed to substantiate their arguments despite ample opportunity. Cf. *Civil Aeronautics Board* v. *State Airlines, Inc.*, 338 U. S. 572, 579-581.

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* Thus, Eastern had one hearing but, because it mentioned some facts in a petition for reconsideration, the court thought it might be entitled to "a further hearing" (App., p. B20).

5. What constitutes "economic" mutual exclusivity?

Hitherto it had been agreed that "a lessened statistical probability that petitioner will ultimately succeed" was "hardly the sort of denial contemplated" by *Ashbacker*. *Pauley* v. *Federal Communications Comm.*, 86 App. D. C. 294, 295, 181 F. 2d 292, 293.*

That is still the Second Circuit's view. As it noted in *Eastern Air Lines, Inc.* v. *Civil Aeronautics Board*, ... F. 2d . . . ., "it also seems clear that although a given award may adversely affect competitors' applications for other routes, this possible adverse effect of itself does not create an *Ashbacker* situation. Rather mutual exclusivity must be established" (App., p. C5).

Apparently the court below no longer subscribes to that view. Now the claimant's application need not be foreclosed, provided its chance of ultimate success may be lessened.**

6. What weight must be given to the Board's expert evaluation of the claim?

Here the court flouted settled principles. The Board's "informed judgment" is to be accepted. *Civil Aeronautics Board* v. *State Airlines, Inc.*, 338 U. S. 572, 581. For "Congress has committed the regulation of this industry to an administrative agency of special competence that deals only with the problems of the industry." *American*

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* There one channel for a radio station was withdrawn for possible grant to one applicant. Other applicants had to compete for the remaining channels. One of them claimed that *Ashbacker* applied because he had less chance to get a station.

** "Likewise, if the foreseeable traffic would support two carriers and there are, let us say, five applicants, the grant of any one is an effective denial of three of the remaining four applications, and *Ashbacker* applies" (App., pp. B8-B9).

Airlines, Inc. v. *North American Airlines, Inc.*, 351 U. S. 79, 84; see also, 355 U. S. 465.

Acceptance of the "informed judgment of an expert body" is particularly necessary on *Ashbacker* matters "if a hopeless administrative jumble is to be avoided."* "The problem is typically one for agency judgment."**

Instead the court below felt free to substitute its views for the Board's expert conclusions that mutual exclusivity did not exist. Actual experience demonstrates how far from the mark the court came (*supra*, pp. 16-17).

7. Even if the Board's procedure is held improper, should its order be nullified in its entirety?

The court assumed so. Thus St. Louis would be deprived of needed service to the Southeast, by the carrier selected to render it, while the Board considered collateral issues further.

No such result is necessary. Here it sufficed simply to modify the authorization to TWA by expressly conditioning it on final determination of the mutual exclusivity issue.***. That would have protected the interest of the public and all carriers.

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* *Eastern Airlines, Inc.* v. *Civil Aeronautics Board*, 85 App. D. C. 412, 413, 178 F. 2d 726, 727.

** *Eastern Air Lines, Inc.* v. *Civil Aeronautics Board*, 100 App. D. C. 184, 186, 243 F. 2d 607, 609; *Eastern Air Lines, Inc.* v. *Civil Aeronautics Board*, 101 App. D. C. 156, 160, 247 F. 2d 562, 566.

*** *Ashbacker* itself noted that the "Fetzer application was not conditionally granted pending consideration of petitioner's application" (326 U. S., at p. 331). *Peoples Broadcasting Co.* v. *United States*, 93 App. D. C. 78, 80, 209 F. 2d 286, 288, held that a "temporary authorization" in the public interest "was a practical solution of" the exclusivity problem. See also, *Beaumont Broadcasting Corp.* v. *Federal Communications Comm.*, 91 App. D. C. 111, 114, note 13, 202 F. 2d 306, 308-309, note 13; *Northwest Airlines, Inc.* v. *Civil Aeronautics Board*, 90 App. D. C. 158, 166, 194 F. 2d 339, 346.

Many other problems in the case could be noted.* Enough has been said, however, to show that the public interest calls for clarification by this court of the present confused extensions of *Ashbacker*.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

JAMES K. CRIMMINS,
CHARLES PICKETT,
Attorneys for Petitioner,
25 Broadway,
New York 4, N. Y.

WARREN E. BAKER,
HENRY P. BEVANS,
ALAN BURTON LERNER,
of Counsel.

February 5, 1960

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* For example, the ruling that a further hearing is needed on the impact of TWA's route on the interchange—a subject to which the Board gave especially careful study (494-496, 652-653)—appears clearly erroneous.

APPENDIX A

Pertinent provisions of §401 of the Civil Aeronautics Act of 1938, 52 Stat. 987, as amended, 49 U. S. C., 1952 ed., §481:

CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

(a) No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Board authorizing such air carrier to engage in such transportation: *Provided*, That if an air carrier is engaged in such transportation on June 23, 1938, such air carrier may continue so to engage between the same terminal and intermediate points for one hundred and twenty days after said date, and thereafter until such time as the Board shall pass upon an application for a certificate for such transportation if within said one hundred and twenty days such air carrier files such application as provided herein.

(b) Application for a certificate shall be made in writing to the Board and shall be so verified, shall be in such form and contain such information, and shall be accompanied by such proof of service upon such interested persons, as the Board shall by regulation require.

(c) Upon the filing of any such application, the Board shall give due notice thereof to the public by posting a notice of such application in the office of the secretary of the Board and to such other persons as the Board may by regulation determine. Any interested person may file with the Board a protest or memorandum of opposition to or in support of the issuance of a certificate. Such application shall be set for public hearing, and the Board shall dispose of such application as speedily as possible.

(d) (1) The Board shall issue a certificate authorizing the whole or any part of the transportation covered by the application, if it finds that the applicant is fit, willing, and

able to perform such transportation properly, and to conform to the provisions of this chapter and the rules, regulations, and requirements of the Board hereunder, and that such transportation is required by the public convenience and necessity; otherwise such application shall be denied.

(2) In the case of an application for a certificate to engage in temporary air transportation, the Board may issue a certificate authorizing the whole or any part thereof for such limited periods as may be required by the public convenience and necessity, if it finds that the applicant is fit, willing, and able properly to perform such transportation and to conform to the provisions of this chapter and the rules, regulations, and requirements of the Board hereunder.

* * *

(f) Each certificate issued under this section shall specify the terminal points and intermediate points, if any, between which the air carrier is authorized to engage in air transportation and the service to be rendered; and there shall be attached to the exercise of the privileges granted by the certificate, or amendment thereto, such reasonable terms, conditions, and limitations as the public interest may require. A certificate issued under this section to engage in foreign air transportation shall, insofar as the operation is to take place without the United States, designate the terminal and intermediate points only insofar as the Board shall deem practicable, and otherwise shall designate only the general route or routes to be followed. Any air carrier holding a certificate for foreign air transportation shall be authorized to handle and transport mail of countries other than the United States. No term, condition, or limitation of a certificate shall restrict the right of an air carrier to add to or change schedules, equipment, accommodations, and facilities for performing the author-

ized transportation and service as the development of the business and the demands of the public shall require. No air carrier shall be deemed to have violated any term, condition, or limitation of its certificate by landing or taking off during an emergency at a point not named in its certificate or by operating in an emergency, under regulations which may be prescribed by the Board, between terminal and intermediate points other than those specified in its certificate. Any air carrier may make charter trips or perform any other special service, without regard to the points named in its certificate, under regulations prescribed by the Board.

(g) Each certificate shall be effective from the date specified therein, and shall continue in effect until suspended or revoked as hereinafter provided, or until the Board shall certify that operation thereunder has ceased, or, if issued for a limited period of time under subsection (d) (2) of this section, shall continue in effect until the expiration thereof, unless, prior to the date of expiration, such certificate shall be suspended or revoked as provided herein, or the Board shall certify that operations thereunder have ceased: *Provided*, That if any service authorized by a certificate is not inaugurated within such period, not less than ninety days, after the date of the authorization as shall be fixed by the Board, or if, for a period of ninety days or such other period as may be designated by the Board, any such service is not operated, the Board may by order, entered after notice and hearing, direct that such certificate shall thereupon cease to be effective to the extent of such service.

(h) The Board, upon petition or complaint or upon its own initiative, after notice and hearing, may alter, amend, modify, or suspend any such certificate, in whole or in part, if the public convenience and necessity so require, or may revoke any such certificate, in whole or in part, for inten-

tional failure to comply with any provision of this subchapter or any order, rule, or regulation issued hereunder or any term, condition, or limitation of such certificate: *Provided*, That no such certificate shall be revoked unless the holder thereof fails to comply, within a reasonable time to be fixed by the Board, with an order of the Board commanding obedience to the provision, or to the order (other than an order issued in accordance with this proviso), rule, regulation, term, condition, or limitation found by the Board to have been violated. Any interested person may file with the Board a protest or memorandum in support of or in opposition to the alteration, amendment, modification, suspension, or revocation of a certificate.

* * *

(j) No certificate shall confer any proprietary, property, or exclusive right in the use of any air space, civil airway, landing area, or air-navigation facility.

Civil Aeronautics Board, Rules of Practice in Economic Proceedings, Part 302, Rule 12 (14 C. F. R. §302.12):

§302.12 CONSOLIDATIONS. (a) The Board, upon its own initiation or upon motion, may consolidate for hearing or for other purposes or may contemporaneously consider two or more proceedings which involve substantially the same parties, or issues which are the same or closely related, if it finds that such consolidation or contemporaneous hearing will be conducive to the proper dispatch of its business and to the ends of justice and will not unduly delay the proceedings. Although the Board may in any particular case, consolidate or contemporaneously consider two or more proceedings on its own motion, the burden of seeking consolidation or contemporaneous consideration of a particular application shall rest upon the applicant and the Board will not undertake to search its docket for all

applications which might be consolidated or contemporaneously considered.

(b) *Time for filing.* A motion to consolidate or contemporaneously consider an application with any other application shall be filed not later than the prehearing conference in the proceeding with which consolidation or contemporaneous consideration is requested, and shall relate only to a then pending application. If made at such conference the motion may be oral. All motions for consolidations or for consideration of issues which enlarge, expand, and change the nature of a proceeding shall be addressed to the Board, unless made orally at the prehearing conference, in which event the presiding Examiner will present such motion to the Board for its decision. A motion which is not timely filed shall be dismissed unless the movant shall clearly show good cause for his failure to file such motion on time. A motion which does not relate to an application pending at the time of or before the prehearing conference in the proceeding with which consolidation or contemporaneous consideration is requested shall likewise be dismissed unless the movant shall clearly show good cause for his failure to file the application within the prescribed period.

(c) *Answer.* If a motion to consolidate two or more proceedings is filed with the Board, any party to any of such proceedings, or any person who has a petition for intervention pending, may file an answer to such motion within such period as the Board may permit. The Examiner may require that answers to such motions be stated orally at the prehearing conference in the proceeding with which the consolidation is proposed.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14798

DELTA AIR LINES, INC., PETITIONER

v.

CIVIL AERONAUTICS BOARD, RESPONDENT
CITY OF NASHVILLE and THE NASHVILLE CHAMBER OF COMMERCE,
CITY OF TAMPA, FLORIDA, and THE GREATER TAMPA CHAMBER OF COMMERCE,
CITY OF KANSAS CITY, MISSOURI,
CITY OF ST. LOUIS, MISSOURI, and THE CHAMBER OF COMMERCE OF METROPOLITAN ST. LOUIS,
TRANS WORLD AIRLINES, INC.,
EASTERN AIR LINES, INC.,
INTERVENORS

No. 14804

AMERICAN AIRLINES, INC., PETITIONER

v.

CIVIL AERONAUTICS BOARD, RESPONDENT
CITY OF TAMPA, FLORIDA, and THE GREATER TAMPA CHAMBER OF COMMERCE,
CITY OF KANSAS CITY, MISSOURI,
CITY OF ST. LOUIS, MISSOURI, and THE CHAMBER OF COMMERCE OF METROPOLITAN ST. LOUIS,
TRANS WORLD AIRLINES, INC.,
EASTERN AIR LINES, INC.,
INTERVENORS

Appendix B

No. 14812

EASTERN AIR LINES, INC., PETITIONER

v.

CIVIL AERONAUTICS BOARD, RESPONDENT
CITY OF TAMPA, FLORIDA, and THE GREATER TAMPA CHAMBER OF COMMERCE,
CITY OF KANSAS CITY, MISSOURI,
CITY OF ST. LOUIS, MISSOURI, and THE CHAMBER OF COMMERCE OF METROPOLITAN ST. LOUIS,
TRANS WORLD AIRLINES, INC.,
DELTA AIR LINES, INC.,
INTERVENORS

No. 14822

NATIONAL AIRLINES, INC., PETITIONER

v.

CIVIL AERONAUTICS BOARD, RESPONDENT
CITY OF TAMPA, FLORIDA, and THE GREATER TAMPA CHAMBER OF COMMERCE,
CITY OF KANSAS CITY, MISSOURI,
CITY OF ST. LOUIS, MISSOURI, and THE CHAMBER OF COMMERCE OF METROPOLITAN ST. LOUIS,
TRANS WORLD AIRLINES, INC.,
INTERVENORS

On Petitions to Review Orders of the Civil Aeronautics Board

Decided December 10, 1959

Before PRETTYMAN, Chief Judge, and BAZELON and FAHY, Circuit Judges.

PRETTYMAN, Chief Judge: These are four petitions for review of orders of the Civil Aeronautics Board made in its *St. Louis-Southeast Service Case*. Principally the Board awarded to Trans World Airlines, Inc. (TWA) a new route from St. Louis to Miami and other Florida coast points, and to Delta Air Lines, Inc., a new Memphis-Birmingham route.

The cases in this court fall into two main parts, one relating to each of the above-mentioned awards. The discussion, however, more aptly falls into four divisions: (I) The mutual-exclusivity contentions advanced by American, Delta and National. These carriers claim that TWA was awarded an effective southern transcontinental route without consideration of economically mutually exclusive applications. (II) Impact of the award to TWA on an existing southern transcontinental interchange arrangement. (III) Eastern's contentions concerning mutual exclusivity. Eastern claims that the Board erroneously made awards to TWA and Delta without comparative consideration of its mutually exclusive applications. (IV) The merits of the TWA and Delta awards, apart from mutual-exclusivity arguments, and some miscellaneous contentions.

I

Two proceedings before the Board play parts in this problem. One is the *St. Louis-Southeast Service Case*, which was instituted to inquire into the need for service "between St. Louis on the one hand and Florida and other southeastern points on the other". Several applications were consolidated in that case.[1] As we have noted, the orders here under review were entered in that

[1] Order No. E-10304 (May 18, 1956); Order No. E-10651 (Oct. 2, 1956).

proceeding. The other case which plays a part in the contentions made to us is known as the *Southern Transcontinental Services Case*. It was a combination of several proceedings, which initially had various names. In its order of consolidation in the *Southern Transcontinental Case*[2] the Board delineated the scope of the proceeding to include (1) the need for single-carrier service between Houston and West Coast points, (2) the need for "single-carrier transcontinental service" between Florida points and the West Coast, and (3) the need for single-carrier transcontinental service between Atlanta-Birmingham and the West Coast. In that order the Board repeatedly used the expression "southern transcontinental route". The Board explained that in prescribing the scope of this hearing it intended to consider new or additional through service in the southern tier of states, that is, from Florida across the southern boundary of the country to and including California. The Board said in that connection: "* * * it is necessary to establish a framework in which all major southern transcontinental service issues as a whole can be determined for the foreseeable future." As thus arranged, the case included a large number of applications.

In the *St. Louis Case* various preliminary motions were made by different carriers, which motions fall generally into two classes. The first class was for expansion of the proceeding to include applications for extensions westward of existing routes into St. Louis from the East, so as to add to them routes from St. Louis to the West Coast, and in the opposite direction for extensions eastward of existing routes into St. Louis from the West, so as to add to them routes from St. Louis to the Southeast. These motions were denied. The other class of motions was to impose restrictions upon any grant of a new route from St. Louis to Florida points, so as to prevent any

[2] Order No. E-12861 (Aug. 5, 1958); Order No. E-13132 (Nov. 4, 1958).

grant of such a route from being in effect a through service Florida-California via St. Louis. In response to these motions the Board announced as a minimum restriction a requirement that service on any route granted between California points and Florida points via St. Louis must include a stop at St. Louis. And the Board further announced that the parties would not be foreclosed from advancing in the course of the hearing appropriate evidence which might reflect a necessity for more stringent limitations. Thus the Board limited the hearing in the *St. Louis Case* to service between St. Louis and Florida and other Southeast points.

The Board awarded to TWA the route from St. Louis to Florida points[3] and imposed as the sole limitation the previously described mandatory stop requirement at St. Louis. TWA was already certificated for through service from St. Louis to California coast points, and the new award was cast in the form of an amendment to TWA's existing Route 2, which was the St. Louis-West Coast route. The effect of the order was to authorize one-plane, one-carrier, through service from Florida coast points to California coast points via St. Louis, with a mandatory stop at St. Louis.

The Board made clear that it selected TWA as the awardee of the new route because this selection would provide for the first time single-carrier, single-plane service between the Florida coast and the California coast. For example, the Board pointed out that TWA's service, "operating nonstop from Los Angeles or San Francisco to St. Louis for expedited carriage to the Southeast onward from St. Louis, will provide a usable and convenient alternative service to the multiple-stop flights operated by the National-Delta American Interchange, and bring important service benefits to a respectable portion of the

[3] Order No. E-13026 (Sept. 30, 1958); Order No. E-13248 (Dec. 8, 1958).

passengers moving in these markets." And in its ruling on a motion for reconsideration the Board said:

> "The TWA award, of course, will permit that carrier to operate a usable one-stop, single-plane service between the West Coast and the points in the Southeast that are being added to its route. It was the carrier's ability to provide these 'beyond area' benefits that was responsible for our selection of TWA as the carrier to perform the *St. Louis-Southeast* services that were found to be required by the public convenience and necessity."

The principal point made by petitioners as to this award is that the Board could not restrict the nature and scope of the *St. Louis Case* to considerations limited to St. Louis-Florida points service, and then in that same case make an award which was for all practical purposes a one-carrier, one-plane, through transcontinental Florida to California route, when there were pending unheard in another proceeding (the *Southern Transcontinental Case*) many applications for transcontinental service Florida to California. This argument is premised upon the fact that the route awarded TWA makes its Florida-California service very slightly longer than would be any route which might be awarded in the *Southern Transcontinental Case*. This method of reaching an award, say the petitioners, is a direct evasion of the *Ashbacker* doctrine.[4]

The law which was established by the Supreme Court in the *Ashbacker* case has been sloganized, given a name, and is often discussed as though it were a technicality. The law which the Court there laid down was far from a technicality. The statute involved (the Communications Act) provided in effect that applicants for licenses should have a right to a hearing before their applications are denied. Two applications which were mutually exclusive were pending. The Court held that the Commission could

[4] Ashbacker Radio Co. v. Federal Communications Comm'n. 326 U. S. 327 (1945).

not grant one without a hearing of the other. The Court said, *inter alia*:

> "For if the grant of one effectively precludes the other, the statutory right to a hearing which Congress has accorded applicants before a denial of their applications becomes an empty thing."[5]

The ruling was a practical conclusion of sound common sense. It is simply a realistic truth that, if only one of several applications can be granted, an award to one applicant is as effective a denial of all the others as would be a flat order of denial.

The foregoing conclusions were premised upon a physical mutual exclusivity of two licenses. It is true, as the Board argues, that the application of the *Ashbacker* doctrine to awards of airplane routes presents many difficulties not in the radio cases. We pointed this out in *Eastern Air Lines* v. *Civil Aeronautics Board*.[6] We now iterate the doctrine there stated: the Board must have a considerable measure of discretion in limiting the areas to be considered in its air-route cases. But at the same time we emphasize that the Board cannot, either intentionally or by the demonstrable effect of an order, avoid what is now known as the *Ashbacker* doctrine.

Another general doctrine, based upon economic considerations, is pertinent to the present case. In many fields, including both communications and air transportation, an operating license requires a preliminary finding of public interest, convenience and necessity.[7] The public

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[5] *Id.* at 330.

[6] 100 U. S. App. D. C. 184, 243 F. 2d 607 (1956), cited and quoted in Eastern Air Lines v. Civil Aeronautics Board, 101 U. S. App. D. C. 156, 247 F. 2d 562 (1957).

[7] As to air transportation, Sec. 401(d)(1), Civil Aeronautics Act, 52 STAT. 987 (1938). The Federal Aviation Act of 1958, which supersedes the Civil Aeronautics Act, contains the same provision. Sec. 401(d)(1), 72 STAT. 754, 49 U. S. C. A. §1371(d)(1).

interest requires service for the public. It therefore requires that, if there be only enough business to support operation by one licensee, there must be only one licensee. This is a commonplace of public utility regulation. We discussed the principle at length in *Carroll Broadcasting Co.* v. *Federal Communications Comm'n.*[8]

The Civil Aeronautics Act[9] requires notice and hearing on applications for certificates for new routes, and also requires notice and hearing upon petitions for modifications of existing licenses, which latter include extensions of existing routes.[10] Under the Act (Sections 401 (d)(1) and 401(h))[11] a finding of public convenience and necessity is a requirement for either the grant of a new certificate or the extension of an existing route. So the principles we have been discussing apply to air certifications. If the grant of one of several applications for a new route does, as a matter of economic necessity, preclude the grant of any other application, the doctrine of *Ashbacker* clearly applies. Likewise, if the foreseeable traffic would support two carriers and there are, let us

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[8] 103 U. S. App. D. C. 346, 258 F. 2d 440 (1958). The principle is also discussed at length in the dissent in RCA Communications v. Federal Communications Comm'n, 91 U. S. App. D. C. 289, 294-296, 201 F. 2d 694, 699-701 (D. C. Cir. 1952), with citations, and is a thread which runs through the opinion of the Supreme Court in that case, Federal Communications Comm'n v. RCA Communications, Inc., 346 U. S. 86 (1953). This was a telegraph case, in which the competition involved was economic, not a radio case in which the exclusivity is physical. Gerico Investment Co. v. Federal Communications Comm'n, 103 U. S. App. D. C. 141, 255 F. 2d 893 (1958), prior to *Carroll*, contains a clear intimation to the same effect.

[9] Sec. 401(c), 52 STAT. 987 (1938), as reenacted, 49 U. S. C. A. §1371(c).

[10] Sec. 401(h), 52 STAT. 989 (1938), as reenacted, 49 U. S. C. A. §1371(g). See, *e.g.*, Eastern Air Lines, Inc., et al., Great Lakes to Florida Service, 6 C. A. B. 429 (1945); Delta Air Corp., et al., Service to Atlanta and Birmingham, 2 C. A. B. 447 (1941).

[11] *Supra* notes 7 and 10.

say, five applicants, the grant of any one is an effective denial of three of the remaining four applications, and *Ashbacker* applies.

The Board denies the applicability of *Ashbacker* in this latter situation and refers us to *Pauley* v. *Federal Communications Comm'n.*[12] However that case involved neither a grant nor a denial of an application and thus is not remotely pertinent to the situation now before us.

The doctrine of *Ashbacker* also applies where a request for an extension of an existing route would preclude the grant of other pending applications for the entire route. If one certificate for a route exists, and if the grant of a second competitive route would as a matter of economic fact destroy or substantially reduce the rendition of the service required by the public interest, the public interest precludes the competitive grant. The Board has frequently recognized and applied this latter rule; as a matter of fact it almost always does so.[13]

This brings us to a consideration of the practicalities of the situation in the case before us. The characteristics of a restricted-area service are entirely different from those of a transcontinental service. This is well recognized in the industry. We think the Board cannot be compelled to expand an area case: but at the same time it cannot be permitted to transform the nature of

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[12] 86 U. S. App. D. C. 294, 181 F. 2d 292 (D. C. Cir. 1950).

[13] See, *e.g.*, Southern Transcontinental Service Case and Dallas to the West Service Case, C. A. B. Order No. E-12861 (Aug. 5, 1958); Investigation of Service to Winston-Salem and/or Greensboro-High Point, C. A. B. Order No. E-12873 (Aug. 8, 1958), 1A Av. L. Rep. par. 22,192; Southern Service to the West Case, Reopened, 18 C. A. B. 234 (1953); Transcontinental & Western Air, Inc., et al., Detroit-Memphis Service, 6 C. A. B. 117 (1944). *Cf.* Seven States Area Investigation, C. A. B. Order No. E-13254 (Dec. 8, 1958), 1A Av. L. Rep. par. 22,226, 22,226.11 (new competitive service would be too costly to the Government in subsidies).

an area case without applying to it the factors which govern the case as transformed. It cannot hear an area case and, without more, make a transcontinental award. It cannot thus ignore pending applications for a transcontinental route certificate, if those applications are mutually exclusive with the award being made. Petitioners, or some of them, had pending applications for through routes Florida to California coast. These were consolidated in the *Southern Transcontinental Case*. They endeavored by motions in the *St. Louis Case* to persuade the Board to do one of two things, either restrict any award in that case so stringently as to preclude its being an effective through southern transcontinental route or give comparative hearing to all pending applications for such a route. They now argue to us that the maximum power of the Board under the statute, construed according to *Ashbacker*, was limited to these two alternatives. The Board apparently agrees with the general principles underlying these arguments; references to them appear in the orders of consolidation.

So the first debated question is whether a *prima facie* showing was made that the TWA award via St. Louis would create in an inadequate market an effective competitor in the southern transcontinental market. The problem, let us remember, is not whether the award should be made but whether these other applicants were entitled to a hearing on the matter. We think we need go no further than the Board's own findings to secure the answer.

In its initial opinion which supported the order in the proceeding now before us, the Board emphasized that the route to be awarded TWA, involving only 12 per cent circuity over a more direct routing between the Southeast and the West Coast, would provide a convenient alternative service to the existing National-Delta-American Interchange. It noted American's estimate that the new award would divert about 50 per cent of the existing interchange traffic.

In prior proceedings the Board had concluded that the available business would not support two southern transcontinental interchange arrangements. In 1951, after a comparative hearing of all then-pending applications, it licensed a single-plane Florida to California service via New Orleans-Dallas by an interchange arrangement operated by American, Delta and National.[14] A year later the Board, without further hearings, authorized a competitive interchange service.[15] This court issued a stay, and thereupon the Board revoked the award and ordered an evidentiary hearing.[16] The Board then found that the proposed new service would be hopelessly uneconomic and denied the certificate.[17] One finding of the Board was that:

> "* * * the record now shows that the proposed interchange could not obtain for itself sufficient traffic to meet the expenses of even one daily round trip from the west coast to Miami."[18]

The Board later reexamined its findings, opinion and decision and reaffirmed its conclusions.[19] Thus the Board in 1954 concluded, after extensive evidentiary hearings, that the potential traffic between the Florida coast and the California coast was not sufficient to justify two competitive interchange services.

All the applications consolidated in the *Southern Transcontinental Case* seem to have included the possibility of one or more stops. Nowhere is it made to appear that

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[14] Southern Service to the West Case, 12 C. A. B. 518.

[15] Southern Service to the West Case, 14 C. A. B. 310 (1951); Southern Service to the West Case, 15 C. A. B. 94 (1952).

[16] Southern Service to the West Case, 15 C. A. B. 124.

[17] Southern Service to the West Case, Reopened, 18 C. A. B. 234 (1953).

[18] *Id.* at 236.

[19] Southern Service to the West Case, Reopened, 18 C. A. B. 790 (1954).

any such applicant sought only a nonstop certificate, to which service the TWA one-stop service might not be potentially competitive. The comparative circuity of the St. Louis route over the proposed through routes would appear to be no greater than over the existing interchange. If the TWA one-stop service is an effective competitor to the existing interchange to the extent of a 50 per cent diversion of the latter's business (assumed by the Board *arguendo*), it seems to us the TWA service must, *prima facie*, be viewed as a potential competitor to some similar extent of any awardee of a transcontinental route Florida coast to California coast involving one or more stops. And, if the Florida-California business via interchange is enough to support service on only one route, the same business available via one carrier, but with a stop, would appear *prima facie* to be not too much greater. If these things be so, an analysis and evaluation of the available business is necessary, if demanded. To state the matter in other terms, if mutual economic exclusivity is claimed and the claim has a reasonable *prima facie* basis, hearing on the question is required.

The Board submits several answers to the foregoing. In the first place the Board says that the motions for consolidation in the *St. Louis Case* filed by some of the applicants for single-plane, single-carrier service from Florida to California were filed too late. Rule 12(b) of the Board's Rules[20] requires that motions to consolidate must be filed not later than the prehearing conference in the proceeding with which consolidation or contemporaneous consideration is requested. In the circumstances of the present case this is an unrealistic suggestion. Some of these applicants made efforts to have the Board expand the *St. Louis Case* so as to include transcontinental considerations. This the Board refused to do. The Board strictly limited that case to issues relating to St. Louis-Southeastern points service. With the issues

[20] 14 CFR 302.12(b).

thus restricted, counsel for these applicants properly restricted their participation to the presentation of evidence which was relevant to those issues. As a matter of fact the Administrative Procedure Act[21] requires the exclusion of irrelevant evidence. Indeed, as the Board seems to recognize in a footnote (5) to its opinion on reconsideration, the posing of the issue as to restrictions was an indication that the Board would prevent any award in the case from being a transcontinental route—quite the contrary to any indication that transcontinental service was to be the subject of the hearing.

In the second place the Board says that all of these applicants were in fact participants in the *St. Louis Case* and, as such, had an opportunity to present whatever evidence they desired to present. But this suggestion is also unrealistic under the view which we have described as applicable to the timeliness point. The Board says that these applicants were well aware of the implications of the TWA application. They obviously were initially so aware, as is evidenced by their various motions and informal requests at the beginning of the case; but, as we have pointed out, the Board severely restricted the issues to be adjudicated and as to which these parties (as applicants or as intervenors) were permitted to participate.

In the third place the Board says it made findings to the effect that there is no mutual exclusivity between the TWA award and the possible grant or grants of the applications now consolidated in the *Southern Transcontinental Case*. The Board points to certain passages in its two opinions as being findings that there was no mutual exclusivity. It cites to us such passages as that the TWA route "would not in any real sense preclude a finding of public need for a more direct routing," and that the

[21] Sec. 7(c), 60 STAT. 241 (1946), 5 U. S. C. A. §1006(c).

award would not "warrant the assumption that TWA will thereby obtain preferential status in deciding the issues in that case." The Board recited that there is no mutual exclusivity, but the quotations hardly qualify as "findings". They are not based on evidence, and they are not consequent to a hearing on the issue of exclusivity.

The question presently before us is not whether the Board might on some evidence before it conclude that there was no mutual exclusivity; the question is whether the applicants are entitled to a hearing on the issue. Their statutory right is to a hearing before denial of their applications; provided, of course, that the allegations of fact are sufficient to raise a debatable question. The right to a hearing is the sole question before us.

On this part of the case we hold: (1) The Board had ample authority to limit the *St. Louis-Southeast Case* to considerations pertinent to that area. (2) After the Board had restricted the case to area considerations and had proceeded to the end on that basis, it could not, in that same case, make a transcontinental award. (3) A *prima facie* indication of economic mutual exclusivity between the applications consolidated in the *Southern Transcontinental Case* and the route awarded in the *St. Louis Case* to TWA appears in this record. The case must therefore be remanded.

We do not intimate to the Board what steps it should take upon this remand. Our holding does not necessitate a full evidentiary comparative hearing on all applications for a southern transcontinental route. The Board might, among a number of alternative courses, (1) hold a hearing upon the exclusivity question alone or (2) impose such a restriction upon the route awarded to TWA via St. Louis as to insure that it would not be an effective competitor with any single-plane, single-carrier transcontinental route which might result from the *Southern Transcontinental Case*.

II

As we have indicated, a three-carrier interchange authorizing Florida California service via New Orleans and Dallas had been licensed in 1951. American argues that the award of a competitive transcontinental service Florida to the West Coast would be a modification of the existing interchange license to which it is a party. We held to the contrary in the *Gerico* case,[22] there concluding that economic damage to an existing licensee is not a modification of the existing license, absent agency rules guaranteeing protection from economic injury.

Petitioners American and Delta also argue that the foreseeable impact of a possible award in the *St. Louis Case* was clearly such as to raise an issue of the public interest in a duplication of services. We have said enough under I, *supra*, to show we agree with that argument. The question required solution by evidence and findings, if a transcontinental award was to be made.

The Board recited its conclusion that the award to TWA was required by the public interest and necessity. But that conclusion was related to a St. Louis-Southeastern-points route. It is entirely true that in making such a finding in a limited-area case the facts of the air transportation system compel consideration of out-of-area factors. We pointed this out in *Frontier Airlines, Inc.* v. *Civil Aeronautics Board*.[23] But that is not our present problem. The problem is the public interest in a competing southern transcontinental service.

The Board makes much of the point that the foreseeable diversion of traffic from the interchange partners is not material to them in the light of their overall re-

[22] Gerico Investment Co. v. Federal Communications Comm'n, 103 U. S. App. D. C. 141, 255 F. 2d 893 (1958).

[23] 104 U. S. App. D. C. 78, 259 F. 2d 808 (1958).

sources. The point is immaterial on the question whether these carriers are entitled to a hearing on the possible existence of mutual exclusivity.

III

We come now to Eastern's contentions respecting its application for an extension of its Route 10 westward from St. Louis to the West Coast and its application for an extension from Memphis to Kansas City. The former controversy concerns the award to TWA and the latter the award to Delta.

Eastern's motion in the St. Louis Case for consolidation of its pending application for a westward extension of Route 10 was denied. Eastern contends that without comparative consideration of its (Eastern's) application the award to TWA of a transcontinental service virtually identical to that proposed by Eastern violated the latter's rights under *Ashbacker*.

Eastern's application for a westward extension of Route 10 must be considered from two points of view. It must be considered from the point of view of the case as a St. Louis-Southeastern-area case, which is what the Board declared it to be. Then it must be considered from the point of view of a through southern transcontinental route, which is what our petitioners say the Board considered in fact.

Eastern has a network of certificated routes spread over the eastern half of the country, with westernmost termini at Chicago, St. Louis, Memphis and San Antonio. An extension from St. Louis to the West Coast would in actual practical fact create for Eastern a Boston-New York-West Coast route via St. Louis, as well as a Florida-West Coast route. The traffic accumulated by the Boston-St. Louis network is part of the "back-up traffic" which the Board says would be fed by Eastern into its new segment St. Louis-West Coast. That the traffic thus

picked up in the Northeast would be greater than that originating in the Southeast seems obvious.

Quite clearly the route sought by Eastern from St. Louis westward was not within the area of the case. Also quite clearly its route Boston-New York-West Coast via St. Louis would not have been a southern transcontinental route. So, if that were all that is involved, no problem would be presented. But, as we have noted, Eastern's requested extension would also connect at St. Louis with its existing St. Louis-Florida-coast route.

We first consider Eastern's application as a part of the *St. Louis Case* as a true area case. Eastern's extension west and TWA's extension east presented different problems in respect to traffic and the area. TWA's extension was physically within the area, and the out-of-area traffic which was involved would flow from existing routes into and through the area over the new segment. This traffic is certainly pertinent to the selection of a carrier to perform intra-area services found necessary because of service deficiencies within the area; such traffic may well, as the Board found, be used to provide the base for proper traffic development within the area.

The basic consideration in an area case is, of course, the public interest in and necessity for service in the area. It seems to us that the need of the area for service to traffic coming in from the outside and also the need of the area for service from inside the area to the outside are both proper considerations in an area case. And so the Board can properly take such needs into consideration. But we think the needs of outside traffic, considered as such, are not necessarily pertinent to an area case. Thus, to illustrate, if traffic originating in Seattle wanted very badly to go to Miami, such need, if not linked with some need inside the southeast area, would not be relevant to a southeast area case. The Board could restrict the area case by excluding such wholly outside data.

Eastern's new segment would have been outside the area, and the traffic picked up by it would have been newly picked up for transportation into the area over an existing service in the area. In other words, this application posed the problem of creating in an area service case a new route outside the area for the purpose, or with the effect, of bringing traffic into the area under consideration. We think the Board cannot be compelled to expand an area case in that way. We think this situation falls within the power of judgment vested in the Board to limit these area cases. We find no error which would require or justify our interference in the Board's decision as a limitation upon a true area case.

We now look at this application of Eastern as part of a southern transcontinental consideration, which, as we have pointed out, is what the Board appears to have undertaken and decided in part in this proceeding. Eastern's existing certificate for Route 10 apparently authorized through service St. Louis-Florida coast points. The record shows, as the Board recites in its Order No. E-13026, that Eastern actually began the operation of such a through service St. Louis-Miami nonstop. So Eastern's application for an extension westward from St. Louis would have given it a Florida-West Coast route with one stop at St. Louis. The eastward extension awarded TWA was St. Louis-Miami via intermediate points Nashville, Atlanta, Tampa and St. Petersburg. So TWA under the award could duplicate Eastern's existing St. Louis-Florida service, either with the stops indicated or nonstop, and the transcontinental route created for TWA by the award is a duplicate of the transcontinental route which would have been created for Eastern by a grant of its application.

Therefore, looking at the matter from the standpoint of a transcontinental service, Eastern occupies substantially the same position occupied by the other applicants

for transcontinental certificates, discussed by us in I, *supra*.

The one factor possibly differentiating Eastern's transcontinental application from those of the other applicants in this case is that Eastern's proposed St. Louis-West Coast route would not be merely a southern transcontinental route but would connect to the West Coast all of Eastern's network of routes in the East. It was on this basis, and on a consideration of the potential traffic between St. Louis and points west thereof named in the application, that the Board reached its conclusion of no mutual exclusivity. The direct question as to exclusivity is whether TWA's St. Louis-Florida segment will prevent a grant of Eastern's St. Louis-West Coast segment. These are not two segments over the same route but come into competition one with the other when they are linked up with the respective existing networks. Thus the whole of both carriers' systems seem to be involved. The Board mentioned as a decisive factor the whole of Eastern's potential traffic, given the new award. It did not mention the comparative whole of TWA's potential traffic, given the new award. The Board's reasoning and the bases for its conclusion on this point are by no means clear. It refers to the substantial "back-up" traffic available to Eastern from its entire eastern network and to "these varied traffic sources". This could mean (1) that the Board did consider the whole of the traffic potentialities of both carriers, or (2) that the Board deemed the traffic potential of the single St. Louis-Southeast route awarded TWA as *de minimis* in comparison with the whole of the traffic potentially available to Eastern from the entire southeastern area and the Northeast, or (3) some other meaning not readily discernible. So we are unable to determine whether the Board's action was or was not valid. Upon the remand the Board will make a clearer definition of its conclusion upon this point and the reasons therefor.

The Board contends that Eastern did not avail itself of the opportunity presented to it to offer evidence in support of its claim of exclusivity. The record shows, however, that Eastern, in its petition for reconsideration of the Board Order No. E-13026, did refer to some facts on which it relied to show mutual exclusivity. The Board's reply, with its reference only to traffic available to Eastern, was inadequate. Therefore, despite Eastern's awareness that the issue of mutual exclusivity was open to it during all stages of the hearing, the Board's failure to make the necessary specific findings deprived Eastern of the full hearing required by *Delta Air Lines* v. *Civil Aeronautics Board*.[24]

In sum, as to Eastern and TWA: If the Board proceeds with the *St. Louis Case* so restricted as to constitute it a true St. Louis-Southeastern points area case, it need not consolidate Eastern's application for the westward extension. But, if it proceeds with the case as in practical effect a transcontinental route case, it must make adequate findings upon the problem of exclusivity, which may or may not involve a further hearing.

The situation of Eastern *vis-a-vis* Delta is that Delta applied for and was awarded a new segment Memphis-Birmingham, which was within the St. Louis-Southeastern area and constituted a link in a St. Louis-Florida coast service, whereas Eastern applied for and was denied a new segment Memphis-Kansas City, the latter point being well outside the area of the case and this segment being no part of a St. Louis-Southeastern service. The question is whether Eastern's Memphis-Kansas City application was required to be consolidated for comparative hearing with Delta's Memphis-Birmingham application.

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[24] 97 U. S. App. D. C. 46, 228 F. 2d 17 (1955). It is true that, unlike the instant case, the *Delta* case did not involve an application for a new route segment outside the limited area under consideration. However, the reasoning of that opinion requires the same kind of hearing in a case such as this, where a *prima facie* showing is made of mutual exclusivity of applications for a particular route.

Delta already has certificated routes in the St. Louis-Southeastern area. These include routes from St. Louis to Memphis and from Memphis roundabout to Jackson-Meridian-Birmingham-Atlanta and thence to Miami. It also has a route Kansas City-Memphis. Eastern, as we have noted, already has certificated routes in the St. Louis-Southeastern area, among them one Memphis-Birmingham-Atlanta and thence to Miami. Eastern urges that the grant to Delta of the Memphis-Birmingham segment creates for Delta a through service Kansas City-Florida coast, and that its (Eastern's) application for a segment Kansas City-Memphis would have created for it, *inter alia*, precisely the same through service Kansas City-Florida points. The Board says (1) that consideration of this Eastern application would be an unwarranted expansion of the area case, and further (2) that the mandatory stops required by it to be made by Delta on any single-plane flights Kansas City-Florida points are sufficient to prevent the award from creating a service which would in any degree preclude an eventual grant to Eastern of the Kansas City-Memphis extension, with authority to overfly Memphis.

Eastern's position is, in effect, that the same considerations which apply to the treatment of the transcontinental route problem, as it arose in the *St. Louis Case*, apply likewise to the Kansas City service problem as it arose in that same case. We think they do not. The expansion of an area case by adding a little additional segment outside the area is quite a different thing from awarding a transcontinental certificate in a limited area case. The former is an expansion of a limited case. The latter is a transformation of the real nature of the proceedings. We are of opinion that the Board had a discretion to refuse to include in the St. Louis-Southeastern area case Eastern's application for the Memphis-Kansas City segment.

Eastern complains that, although the Delta award would not be mutually exclusive with one part of its application,

it would preclude the award to Eastern of another part of its application, namely, the identical route, with the same mandatory stops, as that obtained by Delta. Eastern complains that the Board made no finding on this point. This Kansas City-Memphis-Birmingham-Atlanta-Florida route would be one of many combinations of routes available to Eastern from Kansas City to Southeast points. But to consider this one route separately would be to require the dissection of an area case into a number of competing segments and to require comparative consideration of each pair of parts of applications. We think there is no such requirement. Moreover in this contention Eastern splits its unrestricted application into small sections and urges that the several sections must be compared with similarly segregated sections of other applications. We think the Board is not required to do this. Were the law otherwise, the Board would be burdened with a flood of applications and motions, with consequent hearings thereon, filed by airlines whenever a new route was proposed which served any point already served by the protesting line. Such a tangle would prevent the Board from performing its statutory duty of upholding the public interest by fostering a sound air transportation system.

IV

Eastern contends that the TWA and Delta awards were not made upon proper findings of public convenience and necessity based on substantial evidence; that the record requires a finding that Eastern could and would satisfy all service needs in the St. Louis-Southeast market; that the Board failed to make sufficient findings on the cumulative diversion of revenue from Eastern because of awards made in this and other cases; that the Board failed to make adequate findings of the market potential; and that TWA was awarded an Atlanta-Florida service without any finding of need for such service. We have examined the record and find these contentions to be

without merit. While it is true that there is some evidence to support Eastern's position on certain of these issues, there is substantial evidence to uphold the challenged findings of the Board. Eastern's basic arguments concerning the lack of need for the creation of new service competitive to Eastern in the St. Louis-Southeast market are intimately tied to its contention that the Board erroneously failed to reopen the record to receive new evidence of Eastern's operations after the commencement of the hearings. These several contentions of Eastern must be viewed against the background of findings by the examiner and the Board, upon extended evidence, that Eastern's service in the Southeast area had been inadequate, that Eastern had not developed the potential market, that more traffic would result from improved service, and that there was a public need for competition in the area. Upon the facts of this case, we think the Board did not abuse its discretion in declining to reopen the record.

It is true that the Board did not find any need for the Atlanta-Florida service awarded to TWA, considered as local service. But it specifically found a need for trunkline service from St. Louis-Nashville to both Atlanta and Florida. We find no error in the Board's award of the route without an absolute restriction against local service between Atlanta and Florida.[25] The Board did place a long-haul restriction on the Atlanta-Florida segment awarded to TWA.

Delta, while agreeing with the Board's findings on the need for a new competitive St. Louis-Southeast route, contends that the Board erred in that it awarded the new route to TWA on the basis of a "need" not in issue and failed to make certain comparative findings as to Delta's and TWA's qualifications for the route. Delta attempts to demonstrate that the Board, without so saying, actually picked TWA as the awardee upon a consideration

[25] It should be noted that Eastern made no request for any such restriction.

of needs of out-of-area traffic. It says the Board specifically excluded from the issues in the case the service needs of out-of-area traffic, *i.e.*, the needs of cities west and north of St. Louis for service to the Southeast area. Nevertheless, says Delta, the Board based the award to TWA upon such needs. But it clearly appears that the only use the Board made of out-of-area traffic data was as one of the factors in selecting the carrier best able to meet the needs of the area. The Board said:

> "Aside from seasonal factors, the end-on integration of the extension from St. Louis to the Southeast with that portion of route No. 2 extending west of St. Louis will permit TWA to combine the traffic flow to and from cities east and west of St. Louis, *so as to support maximum frequencies in the St. Louis-Southeast markets and better develop the traffic potential in this area.*" (Emphasis added.)

This course was approved by us in *Frontier Airlines, Inc.* v. *Civil Aeronautics Board*, *supra*, and discussed herein in relation to Eastern's claim. The use of out-of-area traffic data for these purposes has no relevance to the point discussed by us in Part I, *supra*, which was the right of competing applications to a hearing when a transcontinental route is being awarded. We find no reversible error in the Board's selection of TWA as the awardee, if the Board is to make an area award only.

We have examined Delta's remaining contention, that the Board failed to make adequate comparative findings on certain points and find nothing that requires us to disturb the Board's disposition. It is clear that the Board in its original opinion discussed Delta's qualifications in comparison to those of TWA. Various other errors allegedly committed by the Board are urged upon us. We have examined these contentions and find no reversible error.

Reversed and remanded for further proceedings not inconsistent with this opinion.

Appendix B

Before:

Prettyman, Chief Judge, Bazelon and Fahy
Circuit Judges, in Chambers.

ORDER

Upon consideration of the motion of Delta Air Lines, Inc., to conform judgment of this court to the opinion, it is

ORDERED that the judgment of this court in these cases is amended to read as follows:

"These cases came on to be heard on the record from the Civil Aeronautics Board and were argued by counsel.

"On consideration whereof, it is ORDERED and adjudged by this court that the orders of the Civil Aeronautics Board on review in these cases are affirmed with respect to the award to Delta Air Lines, Inc., and are reversed with respect to the award to Trans World Airlines, Inc., and that with respect to the award to Trans World Airlines, Inc., these cases are remanded to the Civil Aeronautics Board for further proceedings not inconsistent with the opinion of this court."

It is FURTHER ORDERED by the court, sua sponte, that the last paragraph of the opinion of this court is amended to read as follows:

"Affirmed in part, reversed in part, and remanded for further proceedings not inconsistent with this opinion."

Dated: January 7 1960

Per Curiam.

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 341, 342, 344—October Term, 1958.

(Argued June 3, 1959 Decided October 7, 1959.)

Docket Nos. 25422, 25434, 25532

EASTERN AIR LINES, INC., CAPITOL AIRWAYS, INC., NATIONAL AIRLINES, INC., CITY OF NASHVILLE and the NASHVILLE CHAMBER OF COMMERCE,

Petitioners,

v.

CIVIL AERONAUTICS BOARD,

Respondent,

DELTA AIR LINES, INC., NORTHWEST AIRLINES, INC., CAPITAL AIRLINES, INC., *et al.*,

Intervenors.

Before:

CLARK, *Chief Judge,*
LUMBARD and WATERMAN, *Circuit Judges.*

The several petitioners bring their respective petitions seeking review of orders of Civil Aeronautics Board entered in the *Great Lakes-Southeast Service Case* wherein that Board granted certain applications and denied others, all pursuant to Section 401 of the Civil Aeronautics Act, 49 U. S. C. A. 481, for certificates of public convenience and necessity to perform new air transportation service.

The several petitions are each denied. Capitol moved for the appointment of a Commissioner or Referee to determine matters relative to procurement of Congressional testimony. This motion is denied.

WATERMAN, *Circuit Judge*:

Presented here for our decision are three separate petitions for review of orders of the Civil Aeronautics Board[1] arising out of the "Great Lakes-Southeast Service Case."[2] These orders marked the culmination of an extensive hearing[3] on new route applications for service between points in a specified geographic area of the Middle West on the one hand and Florida on the other. The Board's ultimate decision, insofar as pertinent to this opinion, was as follows: Northwest Airlines was awarded a route between Miami and Chicago; the authority of Delta Air Lines was extended so as to permit Miami-Detroit service; and that

[1] The orders are E-13024, the Board's formal opinion in the *Great Lakes-Southeast Service Case*, rendered on September 30, 1958, and E-13211, entitled "Opinion and Order Granting and Denying Stay of Effective Date of Certificates," rendered November 28, 1958. In view of our disposition of the contentions herein we need not decide whether the second order was effective to supplement the formal opinion, but see *Frontier Airlines* v. *CAB*, 259 F. 2d. 808, 810-811 (D. C. Cir. 1958).

[2] Applications for new route certification are normally decided by the Board in a consolidated "area proceeding." The Board establishes a given geographic area. Thereupon all applications for routes within this area are considered jointly. This Board procedure was approved by the Supreme Court in *CAB* v. *State Airlines*, 338 U. S. 572 (1950).

[3] Some idea of the breadth and complexity of the investigation can be obtained from the following statistics. There were 42 route applications, made by 10 carrier applicants. There were 5 carrier intervenors, 40 civic intervenors, and 42 limited participants. The record consists of 29 volumes totaling 16,000 pages. The evidentiary hearing lasted 8 weeks. The Initial Decision covered 378 pages. The two orders here objected to consist of a modest 88 pages.

of Capital Airlines[4] was extended so as to confer upon it authority to render service between Miami and the three cities of Cleveland, Pittsburgh, and Buffalo. Prior to these awards the route between Miami and Chicago was served by both Delta and Eastern Air Lines; Eastern offered the only single-carrier service between Miami and the cities of Detroit, Cleveland and Pittsubrgh;[5] and between Miami and Buffalo there was no direct service. Petitioners are as follows: Eastern, which objects to all three awards; Capitol Airways,[6] an unsuccessful applicant for the Miami-Chicago and Miami-Detroit routes, which objects to the Board decision as to these routes; and the City of Nashville, Tennessee, which objects to the fact that the Board drew the geographical boundaries of the "area proceeding" in such a manner that service to and from Nashville was excluded from consideration.

Eastern

Eastern's primary contention is that the Board has violated the principle of *Ashbacker Radio Corp* v. *FCC*, 326 U. S. 327 (1945) in failing to consolidate in this "Great Lakes-Southeast Service Case" an Eastern application for extension of its route authority from Chicago to Minneapolis/St. Paul so that this extension application would be considered along with the proposals by the other carriers for new service between Chicago and Miami. By its con-

[4] Capital Airlines is not to be confused with Capitol Airways, a petitioner herein. Capital is a certificated carrier whose routes cover much of the eastern half of the country.

[5] The Board has authorized "interchange" arrangements between Miami and these cities, providing for single-plane service over the routes of two airlines. From the briefs we gather that these arrangements have not been particularly successful.

[6] Capitol is an uncertificated carrier operating under a Board exemption. Its principal business has consisted of performing charter services for the military. For one year, ending July 1955, it conducted scheduled passenger operations within the State of Tennessee.

solidation order E-9734, issued November 16, 1955, the Board eliminated from consideration in the proceeding all applications for service to areas north and west of Chicago. Eastern points out that, under the award here objected to, Northwest, which was previously certificated for service between Minneapolis/St. Paul and Chicago, will now be permitted to conduct direct service between Minneapolis/St. Paul and Miami.[7] Eastern further points out that its application for extension from Chicago to Minneapolis/St. Paul, filed eight years before Northwest's application for Chicago-Miami authority and contemplating exactly the same Miami-Minneapolis St. Paul service as the Board has here awarded Northwest, was not given simultaneous, comparative consideration. Eastern contends that certification of Northwest for Miami-Minneapolis/St. Paul service will as a matter of economic fact preclude certification of Eastern for that same service. Thus Eastern contends that the Board's procedure has violated the *Ashbacker* principle.[8]

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[7] Pursuant to the Board's consolidation order which denied any successful applicant the right to conduct nonstop flights between "beyond area cities" and points newly authorized in the proceeding. Northwest's flights between Minneapolis/St. Paul and Miami must stop at Chicago. The Board denied Eastern's demand that single-plane flights also be prohibited.

[8] Eastern's *Ashbacker* argument in the *Great Lakes-Southeast Service Case* has been before the courts once previously. Eastern petitioned the Court of Appeals for the District of Columbia to review the Board's consolidation order. The petition was dismissed, *Eastern Air Lines* v. *CAB*, 243 F. 2d 607 (D. C. Cir. 1956), on the theory that a consolidation order was not a "final order" for purposes of judicial review. Having dismissed the petition, the court went on to suggest that the *Ashbacker* doctrine was inapplicable to large-scale, multi-application area proceedings. Eastern quite rightly contends that this decision is not *res judicata* in the present case; and, deciding the case as we do, we need not consider the possible inapplicability of *Ashbacker*.

Ashbacker Radio Corp. v. *FCC*, *supra*, involved two applications for the construction of radio stations. The stations planned to operate at the same frequency and were located in cities less than fifty miles apart. The Federal Communications Commission found that these two applications as a matter of physical fact were mutually exclusive and thereupon granted one application without hearing and relegated the second to a hearing to be held later. The Supreme Court reversed the Commission, holding, as a matter of statutory construction, that two mutually exclusive applications must be granted a concurrent hearing. Although *Ashbacker* dealt only with physical exclusivity its doctrine soon found its way into aeronautical law, and was applied to applications for the same routes which were mutually exclusive "as a matter of economic fact." *Northwest Airlines* v. *CAB* (D. C. Cir. 1952), 194 F. 2d 339; *Delta Air Lines* v. *CAB* (D. C. Cir. 1955), 228 F. 2d 17. See also *Seaboard & Western Airlines* (D. C. Cir. 1949), 181 F. 2d 777; *Western Air Lines* v. *CAB* (9 Cir. 1950), 184 F. 2d 545.

On the other hand, it also seems clear that although a given award may adversely affect competitors' applications for other routes, this possible adverse effect of itself does not create an *Ashbacker* situation. Rather mutual exclusivity must be established. In this and other area proceedings, when faced with the protests of carriers who have applied for routes outside the geographic limits of the Board's consolidation order, the Board has adhered to the practice of permitting these carriers to intervene and contest the issue of mutual exclusivity. This procedure was expressly approved in *National Airlines* v. *CAB*, 249 F. 2d 13 (D. C. Cir. 1957). It was followed scrupulously in the present case. Eastern was afforded an ample opportunity to present evidence on the issue of exclusivity. It presented

none.[9] This failure to make any showing of mutual exclusivity is fatal to Eastern's *Ashbacker* contentions. The cases which have dealt with this problem clearly suggest that it is incumbent upon the applicant asserting mutual exclusivity to substantiate the claim before the agency. *Delta Air Lines* v. *CAB, supra; National Air Lines* v. *CAB, supra.* We hold that in an area proceeding where an applicant objects to exclusion of his application by a consolidation order, and does not submit evidence in support of his objection, the agency may treat the objection as not having been made.

Second, Eastern points to three instances that it claims are such departures from orderly administrative procedure as to vitiate the Board's action. Eastern's contentions, which will be discussed in turn, relate to (1) a "press release" announcing the Board's tentative decision and released six months before the Board's opinion; (2) participation by assistants of Board members at Board meetings in which tentative awards were made; (3) receipt by the Board immediately prior to oral argument of alleged *ex parte* representations concerning an equipment program commenced by Capital Airlines, the carrier ultimately awarded authority between the cities of Miami and Cleveland, Pittsburgh and Buffalo.

Pursuant to a policy begun at some time more than two years ago, the Board, approximately two months after the

[9] At the hearing before the examiner Eastern requested that the applicants for the Chicago-Miami route be compelled to produce data on the percentage of occupancy on some of the applicants' flights. The request was denied. Before the Board Eastern argued that this "load factor" data was relevant to mutual exclusivity. However, before the examiner Eastern argued only that this evidence was relevant to the ability of these applicants to improve upon Eastern service, or, in the alternative, to the inadequacy of load factor data as evidence in determining the caliber of existing service.

completion of oral argument, issued a "press release" announcing the route awards it was granting in the *Great Lakes-Southeast Service Case*. The press release expressly stated that the announcement of the awards did not constitute decisions in the case but that decisions would be entered and issued later. We construe this language to mean that the announced awards did not constitute final determinations but were tentative only, and that there were to be no definitive awards until the issuance of the Board's formal opinion.[10] The awards conferred by the Board's formal opinion, however, coincided exactly with those announced in the previous press release. Eastern claims that in effect this practice amounts to a prejudgment, in that the opinion, written six months subsequently, represents nothing more than a rationalization of conclusions previously reached; and that, therefore, the opinion is a nullity even if otherwise legally sufficient. We do not mean to express approval of the Board's practice of making public its tentative decisions. We only indicate that Eastern's claim of prejudgment is unsound. Eastern does not contend that the interval between the completion of oral argument and the Board's tentative decision was so short that it precluded thoughtful consideration of the evidence presented. Moreover, if the careful marshaling of facts required in drafting an opinion

[10] The Board's explanation of its press release procedure is enlightening. Because of the complexity of the data presented to it in an area proceeding (see footnote 3, *supra*), the Board has found it necessary to make a preliminary, tentative decision, then to draft an opinion based upon it, and thereafter to take a further and perhaps final vote to accept or reject the decision embodied in the proposed opinion. Prior to the adoption of the press release procedure, the Board says that news of the Board's tentative decision seemed invariably to "leak" to interested outside persons. The stated purpose of the press release, therefore, is to make this information uniformly available to the general public and is an admission by the Board that "leaks" do occur and that the Board is powerless to prevent them.

should have indicated that a different decision was proper, the tentative decision announced in the press release need not have prevented the Board from reaching a different decision. Hence we hold that the press release procedure did not deny Eastern a fair hearing.

Eastern objects to two of the Board's subsidiary awards[11] for the reason that at the tentative votes on these awards two assistants to Board members participated in place of their respective superiors.[12] However, leaving aside the fact that these votes were merely tentative, we note that the votes in question were cast only after two days of discussion by the Board when all of its members were present, and that the votes later cast by the assistants were cast in compliance with instructions given by their superiors. Accordingly, we find no improper delegation; and, assuming such right to exist, we find no deprivation of an applicant's right to joint deliberation upon his application by the Board members before vote is had upon it.

Eastern contends that the Board must have considered information in its hands relating to an equipment acquisition program announced by Capital three days prior to commencement of oral argument before the Board as bearing upon the issues here, and therefore Eastern was unfairly prejudiced since this information was not part of the record in the case. More specifically, Eastern objects to Capital's wide circulation of a press release relating to the

[11] These were an award to United to serve Columbus and Dayton on Washington-Chicago flights, and one removing from Northwest all restrictions on that carrier's Washington-Pittsburgh-Cleveland-Detroit route. Eastern had applied for each of the routes which these votes awarded to other carriers.

[12] The award to United was by vote of 4–0, one vote being cast by an assistant. The vote with respect to Northwest was 4–0, two votes being cast by assistants.

equipment program and, branding this an effort to bring improper pressure upon the Board, Eastern demands that the record be reopened to determine Capital's fitness. In addition, Eastern claims that it was unfairly prejudiced because the manufacturer from whom Capital proposed to purchase its equipment communicated to the Board just prior to the beginning of oral argument the details of the proposed purchase. The Board assures us that the decision to award Capital the Miami-Buffalo, Cleveland, Pittsburgh route was uninfluenced by the announcement of Capital's equipment acquisition program. We have no reason to doubt this representation. The communication to the Board by the manufacturer was not improper, for such information was relevant to Board functions unconnected with the *Great Lakes-Southest Service Case.*[13] See *Van Curler Broadcasting Corp.* v. *United States*, 236 F. 2d 727, 730 (D. C. Cir. 1956), *cert. denied*, 352 U. S. 935. There is no indication that Capital made any covert communications to members of the Board, and hence the recent case of *WKAT* v. *FCC*, 258 F. 2d 418 (D. C. Cir. 1958), is inapposite.

Finally, Eastern contends that, as to the following matters, the Board has failed to make appropriate findings or has failed to support its findings with substantial evidentiary findings: inadequacy of existing service; advantages purported to result from competitive authorizations; sufficiency of various markets to support additional carriers; and insubstantiality of Eastern's loss of revenues resulting from new authorizations.

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[13] Equipment acquisition programs are relevant to a carrier's needs for additional revenue. At the time of the communication to the Board, the Board was conducting a comprehensive investigation of passenger fares. Second, a change in the ownership of Capital, a matter calling for Board approval under Sec. 408 of the Civil Aeronautics Act, 49 U. S. C. A. 488, could possibly result from the financing provisions of the proposed equipment acquisition program.

As to the first two matters, the recent case of *FCC v. RCA Communications*, 346 U. S. 86 (1953), is controlling. The Court there indicated that an agency's determination that competition in and of itself was a desirable objective would be upheld provided that the agency based its determination upon its own expert knowledge of the industry under its control rather than on some general notion of national policy. In the present case the Board did determine that increased competition on air routes was desirable when there was sufficient traffic.[14] Therefore, further findings with respect to inadequacy of service, or benefits to be derived from competition, are unnecessary. We have examined the Board's findings on size of market and diversion and have found these findings adequately stated and supported by substantial evidence.[15] See *Universal Camera Corp.* v. *NLRB*, 340 U. S. 474 (1951); *Colorado Wyoming Gas Co.* v. *FPC*, 324 U. S. 626 (1945).

We have examined Eastern's other contentions and have found them to be without merit.

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[14] "The Board in the past has recognized the benefits which accrue to the public from stiff multi-carrier competition in major traffic markets in the form of improved quality and quantity of service, increased coach service, utilization of the most modern equipment, etc. We believe that the authorization of a third Chicago-Miami carrier will bring comparable benefits here. We do not find that the services Delta and Eastern have provided are legally inadequate in terms of section 404(a) of the Act. However, we find that the Chicago-Miami market is sufficiently large now and has the inherent potential to support three carriers on an economic basis, and that the public interest will be served by certificating a third carrier." *Great Lakes-Southeast Service Case*, E-13024 [R. 15222].

[15] We note further that Eastern introduced no evidence on the issue of diversion, thus failing to sustain the burden required under *Clarke* v. *United States*, 101 F. Supp. 587, 594 (D. D. C., 1951).

CAPITOL

As hereinbefore stated, Capitol was an unsuccessful applicant for the Miami-Chicago and Miami-Detroit routes. Capitol's objections to the Board's decision are two: first, the Board failed to make findings concerning Capitol's fitness and the public need for its proposed service; second, the Board erred in allowing additional time at oral argument for statements by Members of Congress, several of whom stated a preference for Northwest, the carrier ultimately selected for the Miami-Chicago route. In connection with the second objection, Capitol has moved that this court appoint a Commissioner or Referee to determine whether Northwest procured the congressional representations, the motion assuming that Northwest initiative in this respect would constitute exertion of undue influence upon the Board by the carrier.

Capitol contends that Section 401 of the Civil Aeronautics Act, 49 U. S. C. A. 481, requires that the Board, when it is confronted with a series of competitive applications, make findings as to whether each applicant is fit, willing and able to supply the service applied for, and as to whether the service proposed by each applicant is required by the public convenience and necessity. Capitol relies upon Section 401(d)(1) of the Act, 49 U. S. C. A. 481(d)(1) which reads as follows:[16]

> "(d)(1) The Board shall issue a certificate authorizing the whole or any part of the transportation covered by the application, if it finds that the applicant is fit, willing, and able to perform such transportation properly, and to conform to the provisions of this chapter and the rules, regulations, and re-

[16] The parties agree that the applicability of the Civil Aeronautics Act to this case is unaffected by its repeal and replacement by the Federal Aviation Act of 1958, 49 U. S. C. A. 1301 *et seq.*

> quirements of the Board hereunder, and that such transportation is required by the public convenience and necessity; otherwise such application shall be denied."

As we read this section it refers only to the findings necessary in order to grant a certificate; it does not purport to deal with situations where the Board has decided *not* to grant the certificate. Courts have previously held that where one of competitive applications is held preferable to the others from the standpoint of public interest, no further findings with respect to the unsuccessful applicants is required. *Continental Southern Lines* v. *CAB*, 197 F. 2d 397, 402-403 (D. C. Cir. 1952), *cert. denied*, 344 U. S. 831; *North American Airlines* v. *CAB*, 241 F. 2d 445, 448 (D. C. Cir. 1957). The findings leading the Board to select Northwest and Delta in preference to Capitol are sufficient and are supported by substantial evidence.[17]

We find no merit in Capitol's contention that congressional representations at oral arguments before the Board in favor of Northwest's application constituted undue influence. We so hold irrespective of whether Northwest actively solicited it. Equally without merit is Capitol's contention that the time consumed in listening to Congressional representations denied Capitol equal time with other applicants for oral argument, or that the failure

[17] Capitol seems to suggest that *American Airlines* v. *CAB*, 235 F. 2d 845 (D. C. Cir. 1956), cert. denied, 355 U. S. 905, and *Pan American-World Airways* v. *CAB*, 261 F. 2d 754 (D. C. Cir. 1958), cert. denied, 359 U. S. 913, have enunciated a more exacting standard for administrative findings of fact. These cases are not applicable here. They merely hold that where the Board permits air operations by exemption under §416(b), 49 U. S. C. A. 496(b), rather than by the more rigorous procedure of certification under §401, 49 U. S. C. A. 481, the Board must give reasons for this short-cut by findings more specific than a mere echoing of statutory language.

to announce in advance that time would be allotted for congressional statements denied it an opportunity to prepare rebuttal and thereby denied it a fair hearing.

City of Nashville

The City of Nashville, Tenessee contends that the Board erred by excluding from consideration the needs of that city for improved air service. The Board's consolidation order[18] set as the westward limit of the geographic area under consideration a line from Chicago to Indianapolis to Louisville to Atlanta (and ultimately to Miami). Subsequently the westward limit was extended to include Chattanooga, Tennessee and Tallahassee, Florida. Nashville lies to the west of this westward limit as amended, and accordingly its service needs were not considered. We do not find that the geographic limits established by the Board were arbitrary or unreasonable, since we must always have in mind the need to keep the hearing within manageable proportions.[19] We find no error here.

Therefore, insofar as the Board's action is challenged by the petitions of Eastern, Capitol, and the City of Nashville, it is affirmed. Capitol's motion to refer certain matters to a Referee or Commissioner is denied.

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[18] Order No. E-9734, issued November 16, 1955.

[19] See note 3, *supra*.